REVIEW OF ACCESS TO AND REPORTING OF FAMILY PROCEEDINGS

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PART I

INTRODUCTION

1.1 This consultation paper concerns access to courts which are conducting family proceedings and reporting by the media of those proceedings. The paper sets out both the current law and the issues to be considered if there are to be changes to the law. It is lengthy, mainly because of the need to set out the detailed provisions of the current law (Part II). Readers who do not wish to study these provisions in depth may wish to concentrate their attention on Parts III and IV in which we set out the issues of principle and possible options for change.

1.2 This paper is issued as part of the Lord Chancellor's rolling programme of reform of family law and business. During the passage of the Children Bill, the Lord Chancellor established an interdepartmental working party, the Family Law and Administration Working Party (FLAWP) to oversee that programme. The consultation paper is the work of a working group of FLAWP. The group consisted of officials from the Lord Chancellor's Department, the Home Office (Magistrates' Courts' Division[1]) and the Department of Health, with assistance from a Law Commissioner and from the Law Commission's Family Law Team.

Arrangement of this paper

1.3 In Part I we set out the terms of reference and background to the review, together with a list of the proceedings covered by the review. In Part II we describe at some length the diversity of the current law and practice as it applies to access to and reporting of family proceedings. Part III then presents an analysis of the principal arguments for and against conducting family proceedings in public and open reporting of family proceedings, and Part IV moves on to look at the need for change and presents a number of possible options. Part V summarises the paper and focuses on

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[1] The Magistrates' Courts Division of the Home Office became part of the Lord Chancellor's Department on 1 April 1992.

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issues raised in previous Parts in the form of a list of questions on which we seek views.

Terms of reference

1.4 When the Children Act 1989 was implemented in late 1991 it created a concurrent jurisdiction for proceedings, allowing for the transfer of cases between the magistrates' courts,[2] the county courts and the High Court. This highlighted the need for consistency in the rules on access to and the reporting of proceedings under the Act and, indeed, in respect of family proceedings generally. The working group of FLAWP was therefore set up in October 1991 and charged with carrying out a full review of these rules. It was given the following terms of reference:–

> "To review the law and practice in relation to access to and reporting of family proceedings. Its aim will be to identify anomalies and shortcomings within the present system and to make recommendations for reform. In particular it shall:–
>
> (a) have regard to the underlying principles of open justice, the need to promote the welfare of children and respect for the privacy of individual family members;
>
> (b) identify existing inconsistencies and anomalies in the law and practice of access to and reporting of family proceedings;
>
> (c) in the light of (a) and (b) consider whether there should be a consistent code, what this code should contain and whether any special rules are necessary in respect of any particular type of proceeding or any particular matter; and
>
> (d) consider a means of ensuring the effective operation of this code at all levels."

1.5 The Government's purpose in issuing this paper is to seek the views of interested parties and the general public on the case in principle for rationalisation of the rules on access to and reporting of family proceedings, and on the relative merits

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[2] Magistrates' courts are termed family proceedings courts under the Children Act when handling family matters.

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of possible options for reform. The Government will not take decisions to reform the law in this area until after this process of consultation and an assessment of resource implications have been completed. A preliminary assessment of the likely costs of any change indicates that these are likely to be de minimis.

Background to the review

1.6 While the general rule of English law is that all courts should sit in public, substantial inroads into this rule have been made over the years. Acts of Parliament and rules of court have authorised courts to sit in private when hearing family proceedings; and legislation passed in 1926, 1968, 1980 and 1989 has imposed reporting restrictions in certain family cases. The law has developed in a piecemeal fashion and therefore contains many inconsistencies. A full account of the current law is given in Part II of this paper.

1.7 The growing inconsistency in this area of law has not passed unnoticed. As early as 1974 the Finer Committee[3] recommended in the context of proposals for a family court that the practice of hearing proceedings in private in the High Court should be extended "to all hearings which ... the public interest did not decisively demand should be conducted in open court". In 1985 the Booth Committee considered whether the privacy of matrimonial proceedings should be extended to defended petitions for divorce and commented that "the extensive press coverage which some defended divorce cases attract is often distasteful and may be very damaging for the parties themselves and for their children. These considerations constitute a powerful argument for private hearings of divorce suits."[4] The Cleveland Report (1988) urged a rationalisation of restrictions on reporting by the media and recommended, at the very least, an automatic ban on the identification of children involved in family proceedings.[5] In 1990 the Calcutt Committee made reference to

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[3] Report of the Committee on One-Parent Families, (1974), Cmnd. 5629, para. 4.408.

[4] Report of the Matrimonial Causes Procedure Committee, 1985, para. 4.100.

[5] Report of the Inquiry into Child Abuse in Cleveland 1987, (1988), Cm. 412, para. 16.51.

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the variety of different provisions in existence and recommended that consideration should be given to amending the legislation on the non-identification of minors in family and criminal cases in England and Wales to eliminate any inconsistencies or uncertainties.[6] That recommendation was reiterated by Sir David Calcutt QC in his Review of Press Self-Regulation published in January 1993.[7]

1.8 Central to this paper are the competing principles set out in paragraph (a) of our terms of reference above. On the one hand, open justice satisfies both the need in a democracy for public discussion on matters of importance that come before the courts and the need for scrutiny of the administration of justice. On the other hand, there are compelling reasons which justify restrictions on open justice. It is, for example, generally considered that children need to be shielded from publicity. In addition, many people may want to keep their personal and family affairs private, while publicity might deter individuals from seeking the remedies to which they are entitled. These arguments are discussed in detail in Part III of this paper.

Definition of family proceedings

1.9 We now set out to define the range of this review by considering which proceedings should come within the scope of 'family proceedings'. Our list is based on the definition of 'family business' found in section 32 of the Matrimonial and Family Proceedings Act 1984.[8] To this we have added proceedings under the Inheritance (Provision for Family and Dependants) Act 1975, and proceedings under certain sections of the Child Support Act 1991. Proceedings under the 1975 Act may be heard either in the Family Division or in the Chancery Division. We propose that only those cases heard in the Family Division be subject to this review.

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6 Report of the Committee on Privacy and Related Matters, (1990), Cm. 1102, para. 10.5.

7 Review of Press Self-Regulation, (1993), Cm. 2135, para. 7.48.

8 This consists of any proceedings which in the High Court are assigned to the Family Division and to no other Division, under s.61 of the Supreme Court Act 1981. The description of the proceedings so assigned is reproduced in the text above, and is found in para. 3 of Sched. 1 to the 1981 Act.

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1.10 There are certain proceedings under the Child Support Act 1991 which may appropriately be described as family proceedings. These include applications for a declaration of parentage under section 27 and proceedings to be heard by a court in accordance with an order made under section 45. These proceedings may fall within the definition of family business below, but we have listed them separately for the avoidance of doubt. Only those proceedings heard in magistrates' courts, county courts and the High Court, as opposed to those heard in child support appeal tribunals, are deemed to be family proceedings for the purpose of this review.

1.11 The full list is as follows:–

(1) 'Family business':–

(a) all matrimonial causes and matters (whether at first instance or on appeal)[9];

(b) all causes and matters (whether at first instance or on appeal) relating to –

(i) legitimacy;
(ii) the exercise of the inherent jurisdiction of the High Court with respect to minors, the maintenance of minors and any proceedings under the Children Act 1989, except proceedings solely for the appointment of a guardian of a minor's estate;
(iii) adoption;
(iv) non–contentious or common form probate business;

(c) applications for consent to the marriage of a minor or for a declaration under section 27B(5) of the Marriage Act 1949;

(d) proceedings on appeal under section 13 of the Administration of Justice Act 1960 from an order or decision made under section 63(3) of the Magistrates' Courts Act 1980 to enforce an order of a magistrates' court made in matrimonial proceedings or with respect to the guardianship of a minor;

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[9] The words "cause" and "matter" are defined in s.151(1) of the Supreme Court Act 1981, and between them cover all types of proceedings. We therefore assume that the phrase "matrimonial causes and matters" includes any proceedings relating to the law of husband and wife. Apart from the more obvious proceedings, it includes proceedings under Part III of the Matrimonial and Family Proceedings Act 1984, those under s.17 of the Married Women's Property Act 1882, and any proceedings relating to the making and enforcement of maintenance orders, including reciprocal enforcement. It also includes proceedings under the Domestic Proceedings and Magistrates' Courts Act 1978, notwithstanding that there are no first instance proceedings under the Act in the High Court.

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(e) applications under Part III of the Family Law Act 1986;

(f) proceedings under the Children Act 1989;

(g) all proceedings under--
(i) the Domestic Violence and Matrimonial Proceedings Act 1976;
(ii) the Child Abduction and Custody Act 1985;
(iii) the Family Law Act 1986;
(iv) section 30 of the Human Fertilisation and Embryology Act 1990; and

(h) all proceedings for the purpose of enforcing an order made in any proceedings of a type described in this paragraph.

(2) Additional proceedings: those under:-

(a) the Inheritance (Provision for Family and Dependants) Act 1975;

(b) certain sections of the Child Support Act 1991.

1.12 This definition is confined to civil proceedings. There are some criminal proceedings which impinge on family matters, such as domestic violence, marital rape, and child abuse. While there are existing provisions governing access to and reporting of such proceedings,[10] these fall outside our terms of reference.

1.13 It remains to be said that, while we have attempted to include all those proceedings which qualify, in our opinion, as family proceedings, we would of course welcome comments as to whether any have been overlooked or omitted.

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[10] In criminal proceedings concerning domestic violence or child abuse it would be open to the court to make an order under s.39(1) of the Children and Young Persons Act 1933 prohibiting media identification of any child or young person involved, which may also have the effect of banning the identification of adults: see paras. 2.24 - 2.26 below for further details. Criminal proceedings in a youth court would also be covered by s.49 of the Children and Young Persons Act 1933 which places restrictions on reporting. In marital rape and other sexual cases, the complainant's anonymity is generally protected under the Sexual Offences (Amendment) Act 1976, s.4, as amended by the Criminal Justice Act 1988, s.158, and the Sexual Offences (Amendment) Act 1992.

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PART II

THE CURRENT LAW

2.1 This Part sets out the current law of access to and reporting of family proceedings. It does so at some length. This is regrettable but inevitable given the complexity of the subject, the various sources of the rules that apply, and the uncertainties within those rules. For the benefit of readers the relevant legislation is brought together at Annex A. We have also produced tables to illustrate the current legal position as regards access and reporting at Annex B. There is also at Annex B a table showing the scale of the different types of proceedings covered.

2.2 While we have made every effort to give a correct picture of the legal position, we would of course welcome any views which might involve a different legal analysis from that given below. We would particularly welcome further information as to how access and reporting are in fact handled in courts at present, especially with regard to the manner of exercise of the discretionary powers outlined below.

2.3 Each type of proceeding is discussed in turn. The examination centres on the specific provisions that apply to that type of proceeding. First, however, an account is given of the position at common law, which forms the background to the specific statutory provisions.

The position at common law: (a) access

2.4 Generally, courts of law must sit in public. This rule was established by the House of Lords in Scott v. Scott.[11] Their Lordships recognised three general exceptions to this rule. The first two related to the exercise of the prerogative jurisdiction over wards and persons of unsound mind. The third was where proceedings were concerned with a secret process, i.e. trade secrets or confidential

[11] [1913] A.C. 417.

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information.

2.5 In addition to these specific exceptions, it is clear that the courts have an inherent power to clear the courtroom where there is disorder in court, and to provide that witnesses should not be present in court before they are called to give evidence. Their Lordships also agreed that there was no power to sit in private merely because the evidence was of an unsavoury or delicate character.[12] This formed the basis of the actual decision in the case, that the court had no general power to hear a nullity suit in camera, with or without the consent of the parties.

2.6 However, their Lordships expressed different opinions as to the existence of a further power to hear proceedings in private. On the one hand, Earl Loreburn considered that a court could hear a case in the absence of the public where:-

> "the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the court".[13]

On the other hand, Lord Shaw thought this to be "very dangerous".[14] Lord Atkinson expressed no view on this point. Viscount Haldane leant towards the view of Earl Loreburn, in that he would have allowed the courts to sit in private, but the party desiring a private hearing would have to "satisfy the court that by nothing short of the exclusion of the public (could) justice be done".[15] Lord Halsbury was more hesitant and wished to guard himself against such a proposition, while not denying that cases might arise where a private hearing would be essential to secure justice.[16]

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[12] *Ibid.*, *per* Viscount Haldane L.C. at p. 438, *per* Lord Halsbury at p. 442, *per* Earl Loreburn at p. 447, *per* Lord Atkinson at p. 463, and *per* Lord Shaw at p. 476.

[13] *Ibid.*, at p. 446.

[14] *Ibid.*, at p. 485.

[15] *Ibid.*, at p. 438.

[16] *Ibid.*, at pp. 442-443.

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2.7 The decision of Wrangham J. in B. (orse P.) v. Attorney-General[17] would seem to have clarified the law, at least in the sphere of family law.[18] In this case, following a previous authority,[19] it was held that the court had no power in proceedings for a declaration of legitimacy to hear the case in camera. This was so even where a litigant would reasonably be deterred from pursuing his remedy unless the case was heard in private. His Lordship thus rejected the approach of Earl Loreburn above.

2.8 To conclude, some years ago the Law Commission identified four overlapping sources from which a court may derive power to sit in private:-

> "(a) when this is permitted under an exception to the rule in Scott v. Scott;
> (b) in interlocutory and administrative matters;
> (c) when the jurisdiction has been validly delegated to a single judge sitting in chambers; and
> (d) under express statutory provision".[20]

The examination below looks at the specific statutory provisions and other rules which allow courts to sit in private.

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[17] [1967] P. 119.

[18] The Law Commission accepted this decision as representing the law: Report on the Powers of Appeal Courts to Sit in Private and the Restrictions upon Publicity in Domestic Proceedings (1966), Law Com. No. 8, p. 6. They proposed the reversal of the decision by statute, and this was implemented in 1968: for the current provision, see para. 2.82 below. The decision of the House of Lords in Attorney-General v. Leveller Magazine Ltd. [1979] A.C. 440 somewhat confused matters. Lord Scarman in this case accepted that "the basis of the modern law is as Viscount Haldane declared it was", and held that a court had power at common law to sit in private where "the factor of national safety appears to endanger the due administration of justice, e.g., by deterring the Crown from prosecuting in cases where it should do" (our emphasis); see [1979] A.C. 440, 471. Viscount Dilhorne, in the course of his speech at p. 457, applied the dictum of Earl Loreburn given above.

[19] Greenway v. Attorney-General (1927) 44 T.L.R. 124, Lord Merrivale P..

[20] Report on the Powers of Appeal Courts to Sit in Private and the Restrictions upon Publicity in Domestic Proceedings (1966), Law Com. No. 8, pp. 6-7.

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The position at common law: (b) reporting

2.9 The position for reporting is much simpler. In the absence of any specific rule of law, the press is at liberty to publish whatever it chooses about legal proceedings. While there is no shortage of legal regulation over what may be reported about legal proceedings, especially for protecting the fairness of future proceedings, these provisions are of little or no relevance to this review.

2.10 It appears that the court has power to make an order preserving the anonymity of witnesses in blackmail, pornography and official secrets prosecutions,[21] but that this power has no application in any civil proceedings. Where proceedings are heard in open court, the press is normally free to publish a full report. This freedom extends to protection from libel suits: a fair and accurate report of proceedings in open court is immune from an action for defamation.[22] The privilege which attaches to such reports does not, however, extend to reports of proceedings heard in private.

Some terminology

2.11 Before setting out the position with respect to the different types of proceedings, it is necessary to outline the meaning of a few terms, namely "in open court", "in chambers" and "in camera".

"In open court"

2.12 Some proceedings must, by statute, be heard in open court.[23] The meaning of the phrase seems quite clear, but, as Lord Widgery C.J. observed, "it is

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[21] For a full account of this power, see C.J. Miller, Contempt of Court, (2nd ed., 1989), pp. 312-315, and Borrie and Lowe's Law of Contempt, (2nd ed., 1983), pp. 194-195.

[22] See Winfield and Jolowicz on Tort, (13th ed., 1989), pp. 337-340.

[23] In the absence of any other provision, this is so for proceedings in the magistrates' courts, by virtue of the Magistrates' Courts Act 1980, s.121(4). See also below para. 2.16.

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not altogether easy to define in terms the characteristics which make a court open, as opposed to one which is conducted in private".[24] He went on to say that "the injunction to the presiding judge or magistrate is: do your best to enable the public to come in and see what is happening, having a proper common sense regard for the facilities available and the facility for keeping order, security and the like".[25]

2.13 Dean J. of the Supreme Court of Victoria stated that "if a court were to sit in an empty building in a remote part of the town, with no public intimation of any kind, it could hardly be an open court merely because the doors were kept open".[26] On the other hand, the fact that the doors to the court are locked shut may not prevent the case being heard in open court. The High Court has recently so held in a case which had to be heard in open court by statutory authority. Here the doors were locked for fear that the person for whom extradition was sought might abscond. Since no person who had the right to attend was prevented from so doing, and given the court's inherent power to regulate the proceedings to prevent absconding, the proceedings were not invalid.[27] But where the trial of a divorce action took place in a judges' law library, with no robes worn by the judge or counsel, and with the word "private" on the entrance to the room, the Privy Council held that the hearing was not in open court.[28]

"In chambers" and "In camera"

2.14 These two terms are often used interchangeably. The usual result of a proceeding being heard either in chambers or in camera is that the public are not admitted, and only the parties and their legal representatives may attend. However,

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[24] R. v. Denbigh Justices, ex parte Williams [1974] Q.B. 759, 764.

[25] *Ibid.*, at p. 765.

[26] Dando v. Anastassiou [1951] V.L.R. 235, 238.

[27] R. v. Westminster City Council, ex parte L. [1992] 1 W.L.R. 253, D.C..

[28] McPherson v. McPherson [1936] A.C. 177, on appeal from Alberta.

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the two terms are not exactly synonymous. Part of the difference between sitting in camera and sitting in chambers was explained by the Law Commission in 1966:

> "Normally a judge (or magistrate) must sit in open court to which the public are admitted. Sometimes, however, he may sit in private. There are two ways in which he can do so. The first, technically known as a hearing in camera, is when the judge orders the court to be closed during the whole or part of the trial. The second is when the judge is technically not sitting in court at all but in chambers. Although he may sit in his usual courtroom, wigs and gowns are not worn, and there is a wider right of audience, for, even in the High Court, solicitors and, with leave of the judge, their clerks may be heard. In both cases the public are not admitted."[29]

2.15 It is also clear that where a court is sitting in chambers, it has an absolute discretion as to whom it allows to be present.[30] However, where the court sits in camera, there is no clear authority as to whether such a discretion exists, though it might be surprising if it did not. Thus, where the court is sitting in chambers, the court has a discretion to allow a litigant to be assisted by a friend who is not legally qualified, also known as a McKenzie friend. It appears from Re G.[31] that where the proceedings are "highly confidential" the court may refuse to allow a McKenzie friend, and that such a ruling will not be disturbed on appeal.

1. Divorce, judicial separation and nullity

(a) Access

2.16 The general rule is that all causes begun by petition[32] should be tried

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[29] Report on the Powers of Appeal Courts to Sit in Private and the Restrictions upon Publicity in Domestic Proceedings (1966), Law Com. No. 8, p. 5.

[30] See Re G. (A Minor) (unreported), 10 July 1991, Court of Appeal (Civil Division) Transcript No. 679 of 1991, referred to in R. v. Leicester City Justices, ex parte Barrow [1991] 2 Q.B. 260. See also Re F. (Minors) (Wardship: Police Investigation) [1989] Fam. 18, 23B-C.

[31] *Ibid.*.

[32] I.e. petitions for divorce, judicial separation and nullity of marriage, and proceedings for a decree of presumption of death and dissolution of marriage. See Family Proceedings Rules 1991, r. 1.2(1).

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in open court.[33] There are two major exceptions:

(i) In nullity suits, evidence on the question of sexual capacity shall be heard in camera unless the judge is satisfied that in the interests of justice it should be heard in open court.[34]

(ii) Under the 'special procedure' for undefended divorce and judicial separation cases the district judge considers the matter on the papers.[35] If he or she certifies that the petitioner has proved the case, only the decree is pronounced in open court.[36]

Access to court documents

2.17 The general rule in all family proceedings is that documents filed or lodged in court offices cannot be inspected or copied by anyone other than a party to the proceedings, his or her solicitor, the Queen's Proctor or a guardian ad litem without leave of a district judge.[37] Exceptions are made for decrees and orders made in open court,[38] for the Attorney-General when considering whether to intervene in declaration proceedings,[39] and for people intending to make applications abroad under the Hague Convention on Civil Aspects of Child Abduction.[40] There is a specific exception in relation to special procedure cases. Rule 2.36(4) provides:

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[33] Family Proceedings Rules 1991, r. 2.28(1)

[34] Matrimonial Causes Act 1973, s. 48(2).

[35] Family Proceedings Rules 1991, rr. 2.24(3), 2.36(1).

[36] *Ibid.*, r. 2.36(2).

[37] *Ibid.*, r. 10.20(1), (3).

[38] *Ibid.*, r. 10.20(3).

[39] *Ibid.*, r. 3.16(10).

[40] *Ibid.*, r. 10.20(2).

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> "Within 14 days after the pronouncement of a decree in accordance with a certificate [issued under the special procedure] any person may inspect the certificate and the evidence filed under rule 2.24(3) [i.e. so as to prove the contents of the petition] and may bespeak copies on payment of the prescribed fee."

Unless a case is tried in open court, therefore, access to most of the evidence and information held at court is effectively in the control of the court or the parties.

2.18 The principles the court will consider when deciding whether to grant leave to disclose evidential documents in wardship cases have been discussed in the recent decisions of Re X. (Minors) (Wardship: Disclosure of Documents),[41] and Re Manda.[42] In Re X, Waite J. considered that the welfare of the child should be an important factor, but not overriding or paramount, and be considered together with the public interest in the due administration of the wardship jurisdiction in accordance with its parental functions and the public interest in upholding the law of the land by providing evidence for use in other proceedings.[43]

2.19 The recent case of Dobson v. Hastings[44] illustrates that rules of court as to the disclosure of court documents are supported by the sanction of contempt of court. Here a reporter gained access to a court file. Leave was required for such access. The reporter knew that leave was required, but thought that this was a formality which would always be granted. The reporter and her newspaper were found not guilty of contempt on the facts. However, it was held that where a non-party inspected documents on a court file, knowing he had no right to do so, and gaining access to them by deception of court officials or by some subterfuge, and then published what he discovered, he was interfering with the administration of justice and

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[41] [1992] Fam. 124.

[42] [1993] Fam. 183, C.A.

[43] In Re Manda, Balcombe L.J. considered the authorities and summarised the principles applicable to the disclosure of material, which restated those outlined in Re X.

[44] [1992] 2 W.L.R. 414, Sir Donald Nicholls V.-C. See also B. v. M. [1990] 2 F.L.R. 46, C.A..

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committed a contempt of court. This also included the situation where the court officer mistakenly granted access and the non-party knew of the mistake.

2.20 The case has implications not only for those seeking access to information held at court concerning family proceedings, but also the reporting of such information. It was held that it would be a contempt of court for the newspaper to publish material from the file which had not yet been published, since it would do so knowing that it was publishing information obtained otherwise than in accordance with the rules. However, it was considered unnecessary to grant an injunction to restrain such publication.[45]

(b) Reporting

2.21 Section 1(1)(b) of the Judicial Proceedings (Regulation of Reports) Act 1926 renders it unlawful to print or publish anything other than certain matters in relation to any judicial proceedings for divorce, nullity or judicial separation. Those matters which it is not unlawful to publish are the names, addresses and occupations of parties and witnesses, a concise statement of those charges, defences, and countercharges, in support of which evidence has been given, submissions on points of law and the decision of the court thereon, the judgment and the observations of the judge in giving judgment. Section 1(1)(a) further prohibits publication of indecent matter or medical details if publication would be calculated to injure public morals.

2.22 The words "print or publish" are not defined, and it could be argued that publication here has the same wide meaning as it has in defamation,[46] ranging from a conversation with a next door neighbour, to a television news bulletin. Section 1(2) of the Act provides that contravention of section 1(1) is an offence, but restricts those who may be prosecuted: "no person, other than a proprietor, editor, master printer or

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[45] It should be noted that this type of contempt is unaffected by section 12 of the Administration of Justice Act 1960: see paras. 2.31 and 2.32 below.

[46] For an account of this meaning, see Winfield and Jolowicz on Tort, (13th ed., 1989), pp. 314-320.

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publisher, shall be liable to conviction" under the Act. It is arguable that these words do not include persons responsible for publications in the broadcast media. The scheme of the Act means, however, that an editor's criminal liability is not limited to publications within the newspaper edited by him. While a prosecution is unlikely, a newspaper editor could be prosecuted for disclosing details concerning his own divorce in, say, a radio interview (or even in conversation with a friend).

2.23 The restrictions apply to all matters printed or published, subject to four exceptions:[47] first, publication for the purpose of the litigation itself; second, the "printing or publishing of any notice or report in pursuance of the directions of the court"; third, "the printing or publishing of any matter in any separate volume or part of any bona fide series of law reports which does not form part of any other publication and consists solely of reports of proceedings in courts of law" – thus law reports are outside the restrictions but law reports in the newspapers are not; fourth, publications of a "technical character bona fide intended for circulation among members of the legal or medical professions" are exempted, and so may include all particulars. It seems clear that periodicals such as "The Law Society's Gazette" and "Counsel" are covered by this exemption; however, it is not clear whether periodicals whose readership is not confined to the professions fall within it. Therefore publications such as "Legal Action" and "Adoption and Fostering" may fall outside the exception, and be subject to the restrictions in section 1(1)(b).

Banning the identification of children

2.24 Where a child is "concerned" in the proceedings, the court may also make an order under section 39(1) of the Children and Young Persons Act 1933.[48] A child is only so concerned if he or she is the person by or against or in respect of whom the proceedings are taken, or if he or she is a witness in the proceedings. The

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[47] Judicial Proceedings (Regulation of Reports) Act 1926, s.1(4).

[48] As amended by the Children and Young Persons Act 1963, s.57, and the Broadcasting Act 1990, Sched. 20, para. 3(2).

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section provides that in relation to any proceedings in any court, the court may direct that no newspaper report, or report in a "programme service",[49] shall reveal the name, address or school of, or include any particulars calculated to lead to the identification of, any child or young person concerned in the proceedings. Bona fide law reports and professional journals are not covered by these restrictions, since the section is confined to newspaper reports and the broadcast media.

2.25 The court has power to make an order under section 39(1) in any court in any proceedings in which a child is concerned. It would therefore be open to the court to make such an order in any family proceedings, although of course there might not be any particular advantage in doing so where specific provisions regarding identification also exist.

2.26 Often, naming the adults in a case will have the effect of identifying the child concerned, which may have been prohibited under section 39. However, the Court of Appeal in Ex parte Godwin and others[50] confirmed that the court has no power to ban the identification of an adult in terms. However, this is not the end of the matter, as Glidewell L.J. remarked:-

> "It may be that on occasions judges who are concerned with making an order of this kind will think that it will be helpful to have some discussion about the identification of particular details and may give advice. Our combined experience is that judges in the Crown Court not infrequently give advice which representatives of the press invariably respect. ... If the inevitable effect of making an order is that it is apparent that some details, including for instance names of defendants [who were adults in the case before the court], may not be published because publication would breach the order, that is the practical application of the order: it is not part of the terms of the order itself."[51]

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[49] A "programme service" is the phrase used by the Broadcasting Act 1990 to cover almost all forms of broadcast media. See the Broadcasting Act 1990, *inter alia*, s. 201.

[50] [1992] 1 Q.B. 190.

[51] *Ibid.*, at pp. 196-197.

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2. Ancillary relief

2.27 This section is concerned with applications in the course of divorce, nullity and judicial separation proceedings for "ancillary relief" as defined in the Family Proceedings Rules 1991, rule 1.2(1). The general privacy scheme applicable to ancillary relief cases also applies to proceedings for the alteration of maintenance agreements under sections 35 and 36 of the Matrimonial Causes Act 1973,[52] and to applications for financial relief after foreign divorce under Part III of the Matrimonial and Family Proceedings Act 1984.[53] Proceedings under section 17 of the Married Women's Property Act 1882 are considered separately below.[54]

(a) Access

2.28 An application for ancillary relief is one made in the course of other proceedings, and so is an interlocutory matter dealt with by the district judge in chambers.[55] There is also provision for matters to be referred to a circuit judge, who will deal with them in chambers unless he or she gives directions to the contrary.[56]

(b) Reporting

2.29 The Judicial Proceedings (Regulation of Reports) Act 1926 will apply to most ancillary relief applications. This is because such applications are made in the course of "judicial proceedings for dissolution of marriage, for nullity of marriage, or for judicial separation" and are therefore covered by section 1(1)(b) of the 1926 Act.

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[52] Family Proceedings Rules 1991, rr. 3.2 to 3.5, incorporating r. 2.66(2).

[53] *Ibid.*, rr. 3.18, 3.19.

[54] At para. 2.75.

[55] County Court Rules, O. 13, r. 1(4).

[56] Family Proceedings Rules 1991, r. 2.66(2).

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In theory, divorce proceedings last forever,[57] and so the Act may cover applications made after decree absolute of divorce. However, it is hard to see how the 1926 Act can apply to applications for relief after foreign divorce or to proceedings for the variation of maintenance agreements, unless these are made in matrimonial causes.

2.30 Further, the 1926 Act is more obviously aimed at the hearing of the petition itself, rather than the sort of evidence which will be given in ancillary relief proceedings; as these are heard in private, however, publication of information relating to them may be a contempt of court.

Reports of proceedings heard in private

2.31 Where a court is lawfully hearing proceedings either in camera or in chambers, then the reporting of such proceedings is governed by the Administration of Justice Act 1960, section 12.[58] The section reads:-

"(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say:

(a) where the proceedings--

(i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;
(ii) are brought under the Children Act 1989; or
(iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor;

...

(e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.

(2) Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of an order made by a court sitting

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[57] *Ibid.*, r. 1.2(2).

[58] As amended by the Children Act 1989, Sched. 13, para. 14.

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in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication.

...

(4) Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section."

2.32 We are not concerned here with paragraphs (b) to (d) of section 12(1) of the 1960 Act. The prima facie rule is that, save in the exceptional cases mentioned in section 12(1), reporting of proceedings heard in private is not a contempt of court simply by virtue of the fact that the proceedings were heard in private. However, publication may still be a contempt of court under other heads of contempt. In particular, the type of contempt mentioned in paragraph 2.19 above is unaffected.

2.33 The Court of Appeal in Re F. (A Minor) (Publication of Information)[59] held that "information relating to proceedings" in section 12(1) includes "such matters as statements of evidence, reports, accounts of interviews and such like, which are prepared for use in court once the ... proceedings have been properly set on foot",[60] as well as an account of the proceedings. However, the section does not operate to make punishable as contempt the publication of the identities of the parties to the proceedings.[61] "Publication" covers nearly all disclosures of information:[62] it would seem that a contempt is committed whenever there is a disclosure by one of the parties to a person who is not a party.[63]

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[59] [1977] Fam. 58.

[60] *Ibid.*, at p. 105, *per* Geoffrey Lane L.J..

[61] See, *inter alia*, Re W. and Others (Wards) (Publication of Information) [1989] 1 F.L.R. 246, 257-258 *per* Sir Stephen Brown P..

[62] Re F. (A Minor) (Publication of Information) [1977] Fam. 58, p.90A *per* Lord Denning M.R.

[63] For an alternative view, see Lowe & White, Wards of Court, (2nd ed., 1986), pp. 169-170. However, the strict rule has recently been reaffirmed; disclosure to medical experts by counsel of evidence in the course of preparation may be a contempt of court, if leave is not obtained in advance: Practice Direction (Wardship: Evidence) [1987] 1 W.L.R. 1421.

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2.34 The Court of Appeal held further that, in the specified cases under section 12(1), publication is not automatically a contempt. Rather, in line with section 12(4), the section should be interpreted as meaning that publication covered by section 12(1) may be a contempt of court, provided it would have been so punishable prior to the 1960 Act.[64]

2.35 Publication of information relating to such proceedings held in private will therefore be a contempt unless either:

(i) the court grants permission for publication; or
(ii) the publisher lacks the requisite *mens rea*.

2.36 As to the first, the Court of Appeal in Re F. (Minors) (Wardship: Police Investigation)[65] held that the judge has an unfettered discretion to grant leave to release information relating to matters in private, and that the exercise of the judge's discretion can only be attacked if it is shown that it was exercised on an incorrect basis.[66] The court also approved the following passage from a judgment of Rees J. in Re R. (M.J.) (A Minor) (Publication of Transcript),[67] concerning the exercise of this discretion in wardship proceedings:–

> "A judge dealing with such an application has an unfettered discretion to grant or refuse it. He will have the interest of the minor in the forefront of his considerations. He will also give considerable weight to the public interest in ensuring that frankness shall prevail in such proceedings by preserving confidentiality. The public interest in upholding the law of the land by providing relevant evidence for use in other legitimate proceedings must also be considered together with all the other circumstances of the case. I do not believe that it would be either possible or profitable to attempt to lay down any

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[64] Re F. (A Minor) (Publication of Information) [1977] Fam. 58, 86–87, 99, approved by the House of Lords in P. v. Liverpool Daily Post and Echo Newspapers plc. [1991] 2 A.C. 370, 421.

[65] [1989] Fam. 18. See also Re X. and Others (Minors) (Wardship: Disclosure of Documents) [1992] 2 W.L.R. 784.

[66] *Ibid.*, at p. 26H, p. 27E.

[67] [1975] Fam. 89, 98D–F.

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general principles governing the exercise of this discretion beyond what I have attempted to state above. This approach to the problem may well justify the view stated in Practice Note (Infants: Transcript) [1972] 1 W.L.R. 443 that persons who are not parties to the proceedings are not likely to obtain a transcript 'save in exceptional circumstances' and, of course, only by leave of the judge concerned."

2.37 As to the second, there is some doubt as to the precise *mens rea* required for a person to be found in contempt under section 12. In Re F. (A Minor) (Publication of Information),[68] the Court of Appeal held that the various publishers were not in contempt as none had known that the information related to proceedings heard in private.[69] Lord Denning M.R. held out the possibility of a contempt being committed recklessly in circumstances in which the alleged contemnor knew that publication might be prohibited, but nevertheless published, not caring whether it was prohibited or not.[70] However, the two other members of the Court of Appeal did not express a view on the matter.

2.38 In Re W. and Others (Wards) (Publication of Information),[71] Sir Stephen Brown P. held that, if actual knowledge that publication was prohibited or the proceedings were in private was not necessary, then the alleged contemnor had to be shown to have wilfully and recklessly failed to make such inquiries as an honest and reasonable man would make.[72]

2.39 It may well be that mere carelessness as to whether the proceedings were heard in private means that no contempt has been committed. In Re F. (A Minor) (Publication of Information),[73] the Court of Appeal observed that had the

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[68] [1977] Fam. 58.

[69] *Ibid.*, at pp. 100–101.

[70] *Ibid.*, at p. 90.

[71] [1989] 1 F.L.R. 246.

[72] *Ibid.*, at p. 265.

[73] [1977] Fam. 58.

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journalists read the documents with more care, they would have realised that the information related to proceedings heard in private, yet they were acquitted of contempt.[74]

2.40 However, apart from wardship and proceedings brought under the Children Act 1989, it is not entirely clear which other proceedings will fall within section 12(1)(a) on the ground that they relate "wholly or mainly to the maintenance or upbringing[75] of a minor".[76] An application for financial provision or property adjustment for a child alone clearly will do so, but in matrimonial cases such applications are normally combined with applications for the spouses.[77] The children's needs may be an important factor in determining the adults' needs, particularly for property adjustment, and anything paid to the adult with whom they live will normally benefit them as well. But it is unlikely that on this account alone the proceedings can fall within section 12(1)(a). If so, the position is that when children's maintenance is considered together with the adults', section 12 does not apply,[78] but if it is dealt with alone, unauthorised publication will be a contempt.

2.41 One further matter concerning section 12(1) requires some comment. Section 12(1)(e) refers to a residual power to ban publication, yet the extent of such a residuary common law power is not at all clear. The prohibition in section 12(2) on publication of information relating to a court order depends upon an express court order. Both section 12(1)(e) and section 12(2) depend upon the court having power

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[74] *Ibid.*, at p. 100 *per* Scarman L.J..

[75] The Children Act 1989, s.105(1) provides that "upbringing" includes the care of the child but not his maintenance.

[76] The meaning of this phrase is discussed throughout this paper where the reporting of proceedings heard in private is in question.

[77] The Child Support Act 1991 also affects the extent to which court hearings relate to a child's maintenance.

[78] It should be noted that Part IV of the Family Proceedings Rules 1991 does not apply to proceedings under Sched. 1 to the Children Act 1989 for maintenance for a minor, where financial relief is also sought by or on behalf of an adult; see r. 4.1(2).

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to make such an order and so regard must be had to the general law. Borrie and Lowe observe that "it seems accepted that the court does have such power in relation to wardship proceedings but beyond this the position is unclear".[79] Distinctions are not infrequently drawn between wardship and other proceedings, because of the parental and administrative nature of the former.[80] Yet it would be odd if the court could punish a person for publishing documents on the court's file[81] but not for publishing an account of oral evidence given in a private hearing. There must be two main objects of holding a hearing in private: first, to promote the proper trial of the case, for example by encouraging witnesses to speak freely; and secondly, to preserve the privacy of the information revealed. Subsequent reporting would not necessarily impede the first, but it might frustrate the second. Nevertheless, the extent of the court's power to prohibit publication is unclear.

2.42 It falls to consider here how the contempt provisions inter-relate with the specific statutory reporting restrictions, not only in the 1926 Act, but also in the Magistrates' Courts Act 1980,[82] and in the Children Act 1989.[83] The various prohibitions are presumably cumulative in their effect: so that, if proceedings are lawfully heard in private and if reporting is covered by one of the provisions in section 12, then it will be a contempt of court to publish even those details which the statutory provisions would allow.

2.43 In the context of ancillary relief, however, it would appear that section 12 will apply only if maintenance for children is mainly involved.

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[79] Borrie and Lowe's Law of Contempt, (2nd ed., 1983), p. 225.

[80] See para. 2.55 below.

[81] At least where leave is required for inspection; see paras. 2.17 - 2.19 above.

[82] See para. 2.51 below.

[83] See paras. 2.52 and 2.53 below.

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3. Children Act 1989

2.44 Applications for many orders under the Children Act 1989 may be made either as free-standing applications or in the course of other "family proceedings".[84] Further, the orders defined in section 8 of the Act may also be made of the court's own motion in any such family proceedings.[85] In the higher courts, the power to hear proceedings under the 1989 Act in chambers[86] extends to the proceedings listed in rule 4.1(2) of the Family Proceedings Rules 1991. These refer mainly to proceedings on an application under the various sections; it would seem that the power to sit in chambers under the Rules does not extend to those family proceedings in which powers under the Act may be exercised solely of the court's own motion.

2.45 The 1989 Act enables the Lord Chancellor to provide for private hearings in the magistrates' courts by Rules of Court.[87] This power extends to any proceedings in which powers under the 1989 Act may be exercised. This therefore includes not only free-standing applications under the 1989 Act, but also any other proceedings where the court has power to exercise its powers under the 1989 Act of its own motion. The range of proceedings covered by the new reporting restrictions found in the 1989 Act is the same,[88] and so any proceedings in which powers under the 1989 Act may be exercised are subject to these restrictions.

(a) Access

2.46 In the High Court and a county court, the hearing shall take place in

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[84] See s.8(3), (4) for the definition of "family proceedings".

[85] Section 10(1)(b).

[86] See below at para. 2.46.

[87] See below at para. 2.49.

[88] See below at para. 2.52.

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chambers, unless the court directs otherwise.[89]

2.47 Proceedings under the Children Act 1989 are "family proceedings" under section 65(1) of the Magistrates' Courts Act 1980. The starting point for access to "family proceedings" within that definition is the provisions of section 69 of the 1980 Act.[90] Section 69(2) provides that no one may be present at such proceedings except:

> "(a) officers of the court;
> (b) parties to the case before the court, their legal representatives, witnesses and other persons directly concerned in the case;
> (c) representatives of newspapers or news agencies;
> (d) any other person whom the court may in its discretion permit to be present, so, however, that permission shall not be withheld from a person who appears to the court to have adequate grounds for attendance".

2.48 "Under the latter category it is thought that a young lawyer seeking to gain experience of certain cases and bona fide researchers would be entitled to attend. Where the proceedings concern a child then a social worker charged with the responsibility of supervising him would be entitled to attend."[91] A magistrates' court also has power to exclude persons under section 69(4) of the 1980 Act. This subsection provides:

> "When hearing family proceedings, a magistrates' court may, if it thinks it necessary in the interest of the administration of justice or of public decency, direct that any persons, not being officers of the court or parties to the case, the parties' legal representatives, or other persons directly concerned in the case, be excluded during the taking of any indecent evidence."

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[89] Family Proceedings Rules 1991, r. 4.16(7). The power to sit in chambers applies to a hearing of, or a directions appointment in, certain proceedings under the Act. The proceedings in question are given in r. 4.1(2), which lists virtually all applications which may be made under the Act; applications for financial relief for a child under Sched. 1 are excluded if financial relief is also sought by or on behalf of an adult.

[90] As amended by the Courts and Legal Services Act 1990, Sched. 18, para. 25(6).

[91] N.V. Lowe, "Publicity in Court Proceedings Concerning Children", (1981) 145 J.P. 256, at p. 257, referring to R. v. Southwark Juvenile Court, ex parte J. [1973] 1 W.L.R. 1300.

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This subsection allows the exclusion of the press, and those allowed access as a matter of discretion, during the taking of indecent evidence.

2.49 Following commencement of the Children Act 1989, section 69 of the 1980 Act is now subject to the provisions of section 97 of the 1989 Act.[92] Section 97(1) enables rules to be made providing for the hearing in private by magistrates of proceedings "in which any powers under [the 1989 Act] may be exercised". Rules have been made, and provide that:

> "If the court considers it expedient in the interests of the child, it shall hear any 'relevant proceedings' in private when only the officers of the court, the parties, their legal representatives and such other persons as specified by the court may attend".[93]

Thus, the prima facie rule is that the press are allowed to attend family proceedings in a magistrates' court, but the magistrates have a duty to exclude them (and others) from any "relevant proceedings"[94] if they consider it "expedient in the interests of the child" to do so. It would seem, however, that the magistrates must make a specific decision as to the interests of the particular child concerned in the proceedings before them, and not simply rely on a general policy of excluding the press.

(b) Reporting

2.50 In the High Court and county court, there is no specific provision on the reporting of proceedings under the Children Act 1989. However, section 12 of the Administration of Justice Act 1960 will apply to proceedings under the 1989 Act which

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[92] Children Act 1989, s.97(8), as amended by the Courts and Legal Services Act 1990, Sched. 16, para. 24.

[93] Family Proceedings Courts (Children Act 1989) Rules 1991, r. 16(7).

[94] These are defined in s.93(3) of the 1989 Act as any application made, or proceedings brought, under the Act, its subordinate legislation, or any amendment made by the Act in any other enactment. It would therefore seem to cover only applications under the Act, and the Rules do not allow for private hearings in which the court is able to exercise powers under the 1989 Act of its own motion.

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are heard in private, which will cover the great majority of cases under the Act.[95] Should the court wish to ban identification of any children involved, it has the power under the Children and Young Persons Act 1933 to do so.[96]

2.51 The Magistrates' Courts Act 1980, section 71, governs the reporting of "family proceedings" in a magistrates' court. No particulars of the proceedings may be reported, save:

> "(a) the names, addresses, and occupations of the parties and witnesses;
> (b) the grounds of the application, and a concise statement of the charges, defences, and counter-charges, in support of which evidence has been given;
> (c) submissions on any point of law arising in the course of the proceedings and the decision of the court on the submissions;
> (d) the decision of the court, and any observations made by the court in giving it."[97]

It is a summary offence to report any particulars other than those given above. This restriction applies to newspapers, periodicals and programmes included in a programme service, but not to "a newspaper or periodical of a technical character bona fide intended for circulation among members of the legal or medical professions",[98] which covers both professional journals and law reports.

2.52 An additional offence relating to the reporting of proceedings was created by the Children Act 1989. Section 71 of the 1980 Act is now subject to the provisions of section 97 of the 1989 Act.[99] Section 97(2) provides that:

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[95] See para. 2.31 onwards above for a full account.

[96] See paras. 2.24 to 2.26 above for an account of this power.

[97] Magistrates' Courts Act 1980, s.71(1A) (previously s.71(1), but altered by the Broadcasting Act 1990, Sched. 20, para. 29(2)).

[98] *Ibid.*, s.71(5).

[99] Children Act 1989, s.97(8), as amended by the Courts and Legal Services Act 1990, Sched. 16, para. 24.

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"No person shall publish[100] any material which is intended, or likely, to identify--

(a) any child as being involved in any proceedings before a magistrates' court in which any power under this Act may be exercised by the court with respect to that or any other child; or

(b) an address or school as being that of a child involved in any such proceedings."[101]

2.53 The combined effect of the two sections is that the media may report certain details about the case, subject to a total prohibition on any details, even those permitted under section 71(1A) of the 1980 Act, where those details are intended or likely to identify the child.[102] Section 97(2) turns the discretionary power of magistrates to impose a ban on identification into an automatic statutory ban. Further, the ban is not limited to proceedings under the Children Act, but includes "any proceedings before a magistrates' court in which any power under this Act may be exercised". The ban on identification of children in a magistrates' court therefore extends to those other "family proceedings", such as adoption proceedings, domestic violence proceedings and proceedings for neglect to maintain, in which the court may exercise its powers under the 1989 Act.[103]

2.54 Proceedings under the Children Act held in private before magistrates, pursuant to the rule mentioned in paragraph 2.49 above, also attract the protection of the Administration of Justice Act 1960, section 12(1). However, any proceedings for

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[100] By virtue of s.97(5), as amended by the Broadcasting Act 1990, Sched. 20, para. 53, 'publish' includes "include in a programme service (within the meaning of the Broadcasting Act 1990)" and 'material' includes any picture or representation.

[101] The offence is subject to a 'no negligence' defence (see s.97(3)) and the court or the Lord Chancellor may by order lift, either wholly or partially, the restrictions under s.97(2), if satisfied that the welfare of the child requires it (see s.97(4)).

[102] It should be noted that there are two offences. The offence under the Children Act 1989 may be committed by anyone and applies to any publication; the Attorney-General need not sanction the prosecution. The offence under the Magistrates' Courts Act 1980 is confined to newspapers, periodicals and the broadcast media and those responsible for publication in the respective format. Further, the Attorney-General must consent to the bringing of a prosecution.

[103] See Children Act 1989, s.8(4)(d), (e).

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committal for contempt of court are heard in a Divisional Court of the Queen's Bench Division of the High Court.[104]

4. Wardship and the inherent jurisdiction

(a) Access

2.55 The court has power to hear proceedings under the inherent jurisdiction in private and usually does so. This is a common law exception to the general rule of open justice.[105] However, if issues of public importance are raised, judgment may be delivered in open court.

(b) Reporting

2.56 Proceedings under the inherent jurisdiction form one of the specified instances under the Administration of Justice Act 1960, section 12. Accordingly, it may be a contempt of court to publish information relating to such proceedings.[106] There is, however, authority suggesting that the ban on publication is not perpetual. Lord Shaw in Scott v. Scott[107] said:–

> "when respect has thus been paid to the object of the suit, the rule of publicity must be resumed. I know of no principle which would entitle a Court to compel a ward to remain silent for life in regard to judicial

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[104] Rules of the Supreme Court, O. 52, r. 1(2)(a)(iii).

[105] Scott v. Scott [1913] A.C. 417. The exception only relates to the inherent jurisdiction of the High Court with respect to minors. It does not cover other proceedings in the High Court involving children:– "The case of wards of Court and lunatics stands on a different footing. There the judge who is administering their affairs, in the exercise of what has been called a paternal jurisdiction delegated to him from the Crown through the Lord Chancellor, is not sitting merely to decide a contested question. ... Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction"; see p. 437 *per* Viscount Haldane L.C..

[106] For an account of the section, see para. 2.31 onwards above.

[107] [1913] A.C. 417.

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proceedings which occurred during his tutelage ...".[108]

2.57 This point was touched on by Geoffrey Lane L.J. in Re F. (A Minor) (Publication of Information).[109] He said:-

> "The embargo on publication of matters disclosed in a private hearing is not necessarily perpetual. Silence should only be enforced for so long as is necessary to protect the interests of those for whose benefit the rule is made. ... Similarly, where all necessity for preserving the confidentiality of information about an infant has with the passage of time disappeared, publication will not be a contempt."[110]

While this point relates primarily to proceedings under the inherent jurisdiction, it may apply to other proceedings protected by section 12.[111]

2.58 Section 12 of the Administration Justice Act 1960 does not provide for an automatic ban on identification of the ward or other parties, but there is a statutory power to ban identification of "a child or young person concerned in the proceedings" under section 39(1) of the Children and Young Persons Act 1939.[112] In addition, the inherent jurisdiction of the High Court confers the power for a judge to make an express order with the effect of such a ban.[113]

2.59 While the power under the inherent jurisdiction is used sparingly, it does enable the court to restrict publication of information beyond that relating either to the proceedings or the identification of the child. The court may, for example, ban the publication of specific information about a particular child; sometimes this may be the

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[108] *Ibid.*, at p. 483.

[109] [1977] Fam. 58.

[110] *Ibid.*, at p. 107.

[111] *Ibid.*; see also Scott v. Scott [1913] A.C. 417, 483 *per* Lord Shaw.

[112] See paras. 2.24 to 2.26 above.

[113] See, *inter alia*, Re W. and Others (Wards) (Publication of Information) [1989] 1 F.L.R. 246.

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whole object of the proceedings and the validity of the injunction does not depend on the continuation of proceedings about the child.[114] The interests of the child in being protected from harm are not, however, the paramount consideration and must be balanced against the freedom of the press to report and comment upon matters of public interest. Often, the child's interests will be adequately protected by anonymity.[115] Disobedience of an order may be a contempt of court,[116] but the requirement of *mens rea* – which assumes knowledge of the existence of the court order making the ban – will mean that the applicant will have to take steps to ensure that the media are aware of the ban.[117]

5. Adoption Act 1976

(a) Access

2.60 In the High Court, adoption proceedings may[118] be disposed of in chambers and usually will be so. In a county court they must be heard and determined in camera.[119] In a magistrates' court only officers of the court, the parties, their lawyers, witnesses and other persons directly concerned in the case may

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[114] Re P. (Minors) (Wardship: Surrogacy) [1987] 2 F.L.R 424.

[115] See, *inter alia*, Re W. (A Minor) (Wardship: Restrictions on Publication) [1992] 1 W.L.R. 100; Re C. (A Minor) (Wardship: Medical Treatment) (No. 2) [1990] Fam. 39; Re X. (A Minor) (Wardship: Jurisdiction) [1975] Fam. 47; Re X. (A Minor) (Wardship: Injunction) [1984] 1 W.L.R. 1422; Re M. and N. (Wards) (Publication of Information) [1990] Fam. 211, C.A.; and Re L. (A Minor) [1988] 1 All E.R. 418.

[116] A contempt under s.12 of the 1960 Act is a criminal contempt of court. Where the court makes an order under the inherent jurisdiction banning the publication of certain matters about a minor, the order operates against the world at large, though it is only binding on those who have the requisite degree of 'knowledge' about the existence of the order. It would seem that breach of such an order is a civil contempt. The distinction is of little importance, save in the sentencing options for the court, owing to the assimilation of the '*mens rea*' requirements for each.

[117] Re W. and Others (Publication of Information) [1989] 1 F.L.R. 246.

[118] Adoption Act 1976, s.64(a).

[119] *Ibid.*, s.64(b).

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be present.[120] Under the European Convention on the Adoption of Children,[121] the U.K. has undertaken to give consideration to the supplementary provisions of the Convention and, if any of these are given effect or cease to have effect, to notify the Council of Europe. The supplementary provisions include Article 20(2) which states that "Provision shall be made to require or permit adoption proceedings to take place in camera".

(b) Reporting

2.61 In the High Court and county courts, there is no specific provision on the reporting of proceedings under the Adoption Act 1976. There is also some doubt as to whether section 12 of the Administration of Justice Act 1960 applies to adoption proceedings which are heard in private, which will be the vast majority of them.[122] Before the amendments made by the Children Act 1989, section 12(1)(a) expressly referred to adoption proceedings. It no longer does so. Adoption is therefore only covered if it relates "wholly or mainly to the maintenance or upbringing of a minor". At first sight it might be thought to do so. However, if adoption proceedings do relate to a child's "upbringing", then it would appear that section 1(1) of the Children Act applies to them. Section 1(1) provides that "when a court determines any question with respect to ... the upbringing of a child ... the child's welfare shall be the court's paramount consideration". It is unlikely that the intention was to make the child's welfare paramount in adoption cases, for this would be a radical change from the previous law under which it is first but, deliberately, not paramount.[123] Equally, however, it would be very surprising if Parliament had intended to remove the protection of section 12(1)(a) from adoption proceedings heard in private. Should the court wish to ban identification of any children involved, however, it undoubtedly has

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[120] Magistrates' Courts Act 1980, s.69(3). There would seem to be no difference between the effect of this section and a court directing that proceedings are to be heard in camera.

[121] T.S. No. 51, (1968); Cmnd. 3673, (1968).

[122] For an account of the section, see para. 2.31 onwards above.

[123] See Adoption Act 1976, s.6.

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power under the Children and Young Persons Act 1933 to do so.[124]

2.62 There is a particular need for confidentiality in adoption proceedings. This is recognised by the Adoption Rules, which allow prospective adopters to apply to the court for a serial number to be assigned to them for the purposes of the proposed adoption.[125] In serial number applications, the proceedings must be conducted so as to protect the identity of the applicant.[126] In all adoption proceedings, all documents at court must be kept in a place of special security, and no documents may be disclosed except in accordance with the Rules, or with leave of the court.[127]

2.63 This is relevant to the reporting of any adoption proceedings since it may be a contempt of court (in addition to an offence under section 39 of the 1933 Act where a ban has been imposed) to disclose the child's new name or the identity of the applicant in a serial number application. It would seem that to disclose the applicant's name when an elaborate procedure has been used to prevent disclosure would be an interference with the administration of justice. It would seem absurd that, in the absence of a ban under section 39 of the 1933 Act, it is left to the discretion of the media whether or not to disclose the applicant's identity, assuming they have been able to find it out. If the media have found out by improper access to court documents, then this will be a contempt of court.[128]

2.64 In a magistrates' court, reporting is governed by the Magistrates' Courts

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[124] See paras. 2.24 to 2.26 above, for an account of this power.

[125] Adoption Rules 1984 (S.I. 1984, No. 265), and Magistrates' Courts (Adoption) Rules 1984 (S.I. 1984, No. 611), r. 14.

[126] *Ibid.*, r. 23(3).

[127] *Ibid.*, r. 53.

[128] See para. 2.19 above.

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Act 1980, section 71(2). This follows the scheme of section 71(1A),[129] save that the particulars set out in paragraphs (a) and (b) of that subsection are excluded from the details permitted to be published. So, the only particulars that may be published are submissions on points of law and the decision of the court on those submissions, the decision of the court and any observations made by the court in giving it.

2.65 Section 97(2) of the Children Act 1989 also applies to adoption proceedings before the magistrates' courts.[130] This reinforces the ban on identification of the parties under section 71(2) of the 1980 Act. However, anyone may commit an offence under section 97(2) of the 1989 Act, whereas the offence under the 1980 Act is limited to the proprietor, editor or publisher of a newspaper or periodical, the corporation broadcasting the programme service and "any person having functions in relation to the programme corresponding to those of an editor of a newspaper". In addition, it is possible that the reporting even of those details permitted under section 71(2) of the 1980 Act may be likely to identify the child. If so, to the extent that identification is likely if certain information is published, section 97(2) of the 1989 Act prohibits its publication.

2.66 Adoption proceedings in a magistrates' court are heard in private. Thus the Administration of Justice Act 1960, section 12, may also apply if adoption proceedings "relate wholly or mainly to the maintenance or upbringing of a minor".[131]

6. Child Abduction and Custody Act 1985

(a) Access

2.67 Applications under the Act, save a few minor procedural applications, are

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[129] See para. 2.51 above for an account of the section.

[130] See paras. 2.52 and 2.53 above.

[131] See para. 2.61 above.

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dealt with in chambers unless the court otherwise directs.[132]

(b) Reporting

2.68 There is no specific provision governing reporting of these proceedings. However, those applications heard in private will probably be covered by section 12(1)(a)(iii) of the Administration of Justice Act 1960, as the proceedings will surely relate to the "upbringing" of a minor.[133]

7. Domestic Proceedings and Magistrates' Courts Act 1978

(a) Access

2.69 Proceedings under the 1978 Act include applications for financial provision for a spouse and/or children of the family under sections 1, 6 and 7, and applications for personal protection and exclusion orders under section 16. All are "family proceedings" within the Magistrates' Courts Act 1980, section 65, and so access is governed by section 69(2) and (4) of the 1980 Act. An account of this section is given at paragraphs 2.47 and 2.48 above.

2.70 Some further comment is, however, needed. Section 69 of the 1980 Act is now subject to section 97 of the Children Act 1989. Section 97(1) confers power to make rules to enable magistrates to sit in private in proceedings "in which any powers under [the 1989 Act] may be exercised". It is thereby open to the Lord Chancellor to make rules to enable private hearings of proceedings under the 1978 Act, since an order under section 8 of the Children Act may be made in proceedings under the 1978 Act.[134] However, the rules made so far have not conferred power

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[132] Family Proceedings Rules 1991, r. 6.8.

[133] For an account of section 12, see para. 2.31 onwards above.

[134] Children Act 1989, s.8(4)(e).

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on the magistrates to sit in private when hearing cases under the 1978 Act.[135] Thus the media may only be excluded in accordance with section 69(4) of the 1980 Act.

2.71 There are other proceedings in the magistrates' courts concerned with the making of maintenance orders that may be mentioned here. These include proceedings under section 35 of the Matrimonial Causes Act 1973 for the alteration of maintenance agreements, and proceedings under section 43 of the National Assistance Act 1948 and section 24 of the Social Security Act 1986[136] for the recoupment of benefit from liable relatives. These too are "family proceedings" within section 65 of the Magistrates' Courts Act 1980 and thus access is as for proceedings under the 1978 Act above. Further, for proceedings under section 35 of the Matrimonial Causes Act 1973 where a child is involved, since the court may exercise powers under the Children Act 1989, it is likewise open to the Lord Chancellor to make rules of court allowing for these proceedings to be heard in private.

(b) Reporting

2.72 The law is as set out at paragraphs 2.51 to 2.53 above.[137] Since the media may always attend proceedings under the 1978 Act, the court is not sitting either in camera or in chambers and so is not sitting in "private" within the meaning of the Administration of Justice Act 1960, section 12(3). Even if the court is subsequently enabled to sit in private, there may be some doubt as to whether section 12 will apply as it is unlikely that many proceedings under the 1978 Act will "relate wholly or mainly to the maintenance or upbringing of a minor".

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[135] As pointed out in para. 2.49 above, the power to exclude the media under the Family Proceedings Courts (Children Act 1989) Rules 1991, r. 16(7), only extends to proceedings under the Children Act. The Family Proceedings Courts (Matrimonial Proceedings etc.) Rules 1991, which govern procedure in proceedings under the 1978 Act, are silent on this issue.

[136] As from 1 July 1992, s.24 of the Social Security Act 1986 was repealed and replaced by s.106 of the Social Security Administration Act 1992.

[137] The restrictions under the Children Act 1989 will apply to proceedings under the 1978 Act, and section 35 of the 1973 Act, since in these proceedings powers under the Children Act may be exercised, but will not apply to proceedings under the 1948 Act or the 1986 Act above.

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8. Family provision

(a) Access

2.73 This section is concerned with proceedings under the Inheritance (Provision for Family and Dependants) Act 1975. In the High Court, the proceedings may be disposed of in chambers, if the court so directs.[138] In a county court, proceedings may be heard and determined by a district judge and, if the court thinks fit, be dealt with in chambers.[139]

(b) Reporting

2.74 There is no specific provision governing reporting of family provision cases. However, section 12 of the Administration of Justice Act 1960 may apply to these proceedings, depending on whether the proceedings "relate wholly or mainly to the upbringing or maintenance of a minor".[140]

9. Married Women's Property Act 1882, section 17

2.75 Applications under this section may be made in the course of proceedings for divorce, nullity and judicial separation. If this is so, the proceedings will be interlocutory and access and reporting are as for ancillary relief cases.[141]

2.76 The position for free-standing applications is less clear. Applications may be heard by the district judge and, as in ancillary relief, there is provision for referral to a circuit judge.[142] The circuit judge has power to sit in chambers.[143]

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[138] R.S.C. O. 99, r. 8.

[139] C.C.R. O. 48, r. 7.

[140] See para. 2.40 above. Section 12 is explained at para. 2.31 onwards above.

[141] See para. 2.28 onwards above.

[142] Family Proceedings Rules 1991, r. 3.6(10), incorporating r. 2.66(2).

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It should be noted that unless the proceedings are interlocutory there is no express provision conferring power on a district judge to sit in chambers. However, there are general provisions which may confer this power. The Supreme Court Act 1981, section 67, reads:-

> "Business in the High Court shall be heard and disposed of in court except in so far as it may, under this or any other Act, under rules of court or in accordance with the practice of the court, be dealt with in chambers." (our emphasis)

The undoubted practice of the High Court is to hear these proceedings in chambers. This power extends to county courts by virtue of section 76 of the County Courts Act 1984. This provides that "in any case not expressly provided for by or in pursuance of this Act, the general principles of practice in the High Court may be adopted and applied to proceedings in a county court". Whether or not other proceedings may be heard in private on the basis of these provisions depends on whether it is the practice of the High Court to deal with the proceedings in chambers. Even where proceedings under the 1882 Act are heard in private, there are no reporting restrictions, as section 12 of the Administration of Justice Act 1960 will not apply.[144]

10. Domestic violence and occupation of the family home

2.77 This section is concerned with the various proceedings in this field heard in the High Court and county courts, that is proceedings under the Domestic Violence and Matrimonial Proceedings Act 1976 and the Matrimonial Homes Act 1983, and under the courts' inherent jurisdiction.[145] Proceedings in magistrates' courts concerned with family protection are considered in the section on the Domestic

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[143] *Ibid.*.

[144] See para. 2.40 above. Section 12 is explained at para. 2.31 onwards above.

[145] The Law Commission last year published a Report: Family Law, Domestic Violence and Occupation of the Family Home, Law Com. No. 207. If implemented, the existing enactments would be replaced by a single Family Homes and Domestic Violence Act.

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Proceedings and Magistrates' Courts Act 1978.[146]

(a) Access

2.78 The court may make orders with respect to these matters in the course of divorce, judicial separation or nullity proceedings.[147] Applications for such orders will be interlocutory and so held in chambers.[148]

2.79 Applications under the Domestic Violence and Matrimonial Proceedings Act 1976 for non-molestation orders and "ouster" orders are dealt with in chambers unless the court otherwise directs.[149]

2.80 Applications for orders regulating occupation rights may be made under the Matrimonial Homes Act 1983. In respect of applications under sections 1 and 9, the hearing shall take place in chambers unless the court otherwise directs.[150] There is no express provision for applications under Schedule 1, dealing with the transfer of tenancies, to be heard in chambers. However, such orders can only be made "on granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation, or at any time thereafter".[151] These are therefore interlocutory applications and so may be dealt with in chambers.

(b) Reporting

2.81 There is no specific statutory provision governing reporting of these

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[146] At para. 2.69 above.

[147] Family Proceedings Rules 1991, rr. 3.8(3), 3.9(3).

[148] See para. 2.28 above.

[149] Family Proceedings Rules 1991, r. 3.9(2).

[150] *Ibid.*, rr. 3.8(2), 3.6(10), 2.66(2).

[151] Matrimonial Homes Act 1983, Sched. 1, para. 1(1).

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proceedings in the High Court or county courts, save that applications in the course of matrimonial causes will be covered by the Judicial Proceedings (Regulation of Reports) Act 1926.[152] Section 12 of the Administration of Justice Act 1960 will not apply even to those proceedings held in private unless the proceedings can be said to relate "wholly or mainly to the maintenance or upbringing of a minor".[153] Most such proceedings will not do so. In Richards v. Richards,[154] a majority of the House of Lords held that the welfare of the child was not the first and paramount consideration in ouster proceedings, because the upbringing of the child was not in question.[155] It would be difficult to argue that, even though the upbringing of a child is not "in question", the proceedings nevertheless relate wholly or mainly to the maintenance or upbringing of a minor. A different view might, however, be taken of proceedings for a non-molestation order to protect a child alone.

11. Declarations of status – Family Law Act 1986, Part III

(a) Access

2.82 The court hearing an application under Part III of the 1986 Act may direct that the whole or any part of the proceedings shall be heard in camera.[156]

(b) Reporting

2.83 By virtue of section 2(1)(d) of the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968, section 1(1)(b) of the Judicial Proceedings (Regulation of Reports) Act 1926 applies to these proceedings.[157] However, there

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[152] See paras. 2.21 to 2.23 above.

[153] See para. 2.40 above.

[154] [1984] A.C. 174.

[155] *Ibid.*, *per* Lord Hailsham L.C. at p. 203; Lord Diplock, at p. 206; Lord Bridge, at pp. 214–215; Lord Brandon, at p. 223. Lord Scarman took the opposite view; see pp. 212–213.

[156] Family Law Act 1986, s. 60(4).

[157] See paras. 2.21 to 2.23 above for an account of these restrictions.

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is a slight difference. Instead of a concise statement of the charges, defences, and countercharges, in support of which evidence has been given, the particulars of the declaration sought by the application may be reported.[158]

2.84 There is considerable doubt as to whether section 12 of the Administration of Justice Act 1960 can apply to these proceedings. It could only do so if the person in relation to whom the declaration is sought is still a minor. Even then, it may be doubted whether declarations under section 57 of the 1986 Act, as to the effect of foreign adoptions, relate "wholly or mainly to the maintenance or upbringing" of the minor.[159] The same applies to declarations of parentage, legitimacy or legitimation under section 56 and *a fortiori* to declarations as to marital status under section 55.

12. Consent to marriage of minors

(a) Access

2.85 In the High Court and county court, applications for the court to consent to the marriage of minors shall be dealt with in chambers unless the court otherwise directs.[160] The High Court alone has jurisdiction to hear applications under section 27B of the Marriage Act 1949[161] for a declaration that no impediment of affinity to a marriage exists. In the absence of any specific provision to the contrary, such applications must be heard in open court.

2.86 In a magistrates' court, these applications are "family proceedings" within the meaning of the Magistrates' Courts Act 1980, section 65. Access is as set out in paragraphs 2.47 and 2.48 above. Proceedings under the 1949 Act are not "family

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[158] Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968, s.2(3).

[159] See para. 2.61 above.

[160] Family Proceedings Rules 1991, r. 3.20(1).

[161] As inserted by the Marriage (Prohibited Degrees of Relationship) Act 1986, Sched. 1, para. 5.

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proceedings" within the meaning of the Children Act 1989, section 8(3), (4). There is no power to make section 8 orders or to exercise any other powers under the 1989 Act in these proceedings, so section 97 of the 1989 Act will not apply. There is therefore no power to make rules allowing for the exclusion of the media.[162]

(b) Reporting

2.87 In the High Court and county court, there is no specific provision on the reporting of proceedings under the 1949 Act. Should the court wish to ban identification of any children involved, it has the power under the Children and Young Persons Act 1933 to do so.[163] It is uncertain whether section 12 of the Administration of Justice Act 1960 will apply to proceedings under the 1949 Act which are heard in private, the difficulty again being the question whether these proceedings relate "wholly or mainly to the maintenance or upbringing of a minor".[164]

2.88 Reporting of these proceedings heard in a magistrates' court is governed by section 71(1A) of the Magistrates' Courts Act 1980. For the reasons explained in paragraph 2.86 above, section 97(2) of the Children Act 1989 does not apply.[165]

13. Matrimonial Causes Act 1973, section 27 – failure to provide reasonable maintenance

(a) Access

2.89 These applications are to take place in chambers unless the court

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[162] See paras. 2.49 and 2.70 above.

[163] See paras. 2.24 to 2.26 above for an account of this power.

[164] See para. 2.40, above.

[165] For a full account of the law, see para. 2.51 above.

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otherwise directs.[166]

(b) Reporting

2.90 The reporting of these proceedings is governed by the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968, which restricts publicity to those matters set out in paragraphs 2.21 to 2.23 above.[167]

2.91 If the application is heard in chambers, section 12 of the Administration of Justice Act 1960 may apply. If the proceedings are solely concerned with maintenance for a child, then the section will clearly apply. For the reasons discussed in relation to ancillary relief in paragraph 2.40 above, it is thought unlikely that an application for financial provision in respect of a spouse alone, or even in respect of a spouse and a child, will fall within section 12.

14. Human Fertilisation and Embryology Act 1990, section 30

(a) Access

2.92 Section 30 is the only section of the 1990 Act not yet in force.[168] A power to hear proceedings under the section in private may be derived from a number of sources, depending on the court in which the proceedings are heard. Proceedings under section 30 are "family business" within section 32 of the Matrimonial and Family Proceedings Act 1984 and Schedule 1 to the Supreme Court Act 1981.[169] There is, therefore, power to make rules of court for proceedings under section 30 in the High

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[166] Family Proceedings Rules 1991, r. 3.1(10) incorporates rr. 2.61 to 2.66 into the procedure for applications under section 27, thus conferring the power to hear the matter in chambers. However, this only applies to matters before a circuit judge; as with ancillary relief and similar matters generally, there is no express provision for the district judge to sit in chambers, but see para. 2.76 above.

[167] Section 2(1)(c) of the 1968 Act incorporates the 1926 Act.

[168] As at the date of publication. See the Human Fertilisation and Embryology Act 1990 (Commencement No. 3 and Transitional Provisions) Order 1991, S.I. 1991, No. 1400, Article 2(2).

[169] See Supreme Court Act 1981, Sched. 1, para. 3(g)(iv), set out at para. 1.11 above.

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Court and county courts, which may include provision for hearings to be in private.[170]

2.93 Alternatively, regulations may be made "for any provision of the enactments about adoption to have effect ... in relation to [section 30] orders ... as it has effect in relation to adoption".[171] For this purpose "the enactments about adoption" means the Adoption Act 1976.[172] Section 64 of the 1976 Act provides that adoption hearings may be in private in the High Court and must be in private in the county courts.[173] The regulations may therefore provide for private hearings of applications under section 30 of the 1990 Act in the High Court and county courts.

2.94 Access to adoption proceedings in a magistrates' court is not governed by the Adoption Act 1976.[174] There is therefore no power to make regulations as above to provide for private hearings of section 30 applications in magistrates' courts. However, it would seem that rules of court may be made under section 144 of the Magistrates' Courts Act 1980 to provide for private hearings.[175] In addition, it would seem that the restricted access provisions applicable to "family proceedings" in a magistrates' court will apply to section 30 applications. Section 30 is not listed in the definition of "family proceedings" for this purpose in section 65(1) of the Magistrates' Courts Act 1980.[176] However, proceedings under section 30 are "family proceedings" for the purposes of the Children Act 1989.[177] This means that, for instance, an order under section 8 of the 1989 Act may be made in the course of

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[170] The rule making power is contained in s.40 of the Matrimonial and Family Proceedings Act 1984.

[171] Human Fertilisation and Embryology Act 1990, s.30(9).

[172] *Ibid.*, s.30(10).

[173] See para 2.60 above.

[174] *Ibid.*.

[175] The section confers a general power on the Lord Chancellor to "make rules for regulating and prescribing the procedure and practice to be followed in magistrates' courts".

[176] See Annex A for the text of this section.

[177] Human Fertilisation and Embryology Act 1990, s.30(8)(a).

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proceedings under section 30.[178] The rule making powers and the reporting provisions of section 97 of the Children Act 1989 apply to any proceedings in which powers under the 1989 Act may be exercised,[179] and so will apply to proceedings under section 30. And, by section 97(8) of the 1989 Act, the restricted access and reporting provisions of sections 69 and 71 of the Magistrates' Courts Act 1980 apply to any proceedings to which section 97 of the 1989 Act applies. The upshot of this rather complicated reasoning is that, in relation to proceedings under section 30 in a magistrates' court, prima facie the media, but not the general public, have a right to attend, but the Lord Chancellor may make rules of court allowing for private hearings.[180]

(b) Reporting

2.95 In the High Court and county courts, there will be no reporting restrictions unless the proceedings are heard in private, though the court will of course have the general power to ban the identification of a child.[181] If proceedings under section 30 are heard in private, it will probably be a contempt of court to publish information relating to the proceedings, depending on whether the proceedings relate "wholly or mainly to the maintenance or upbringing of a minor" within section 12 of the Administration of Justice Act 1960.[182] This applies also to proceedings heard in private in a magistrates' court. In addition, reporting of section 30 proceedings before magistrates will attract the provisions of section 71 of the Magistrates' Courts Act 1980 and section 97 of the Children Act 1989. This means that there is an automatic ban

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[178] Children Act 1989, s.10(1).

[179] *Ibid.*, s.97(1), (2).

[180] See further paras. 2.46 to 2.48 above. In addition, s.34(3) of the 1990 Act confers a power on the court to sit in camera when ordering the disclosure of material kept on the register of information relating to treatment services. However, since most family proceedings in which this power is available will usually be heard in private anyway, this is not of great importance.

[181] See paras. 2.24 to 2.26 above.

[182] See para. 2.31 onwards above.

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on identifying the child concerned, and restrictions on the details that may be published.[183]

15. Child Support Act 1991

2.96 The Child Support Act 1991 provides for new methods of assessing, collecting and enforcing child maintenance, and for the collection and enforcement of certain other kinds of maintenance. It has considerably changed the role of the ordinary courts in this process. Most child maintenance cases previously dealt with by the courts will be processed by a system of administrative assessment. Such assessment (by child support officers) will be mandatory for those in receipt of income support, family credit or any other benefit of a prescribed kind, and will be available on application to most other people eligible to receive child maintenance. Based on the existing system for social security appeals, the Act provides for appeals against decisions of child support officers to be made to child support appeal tribunals, and for further appeals on points of law to be made to a Child Support Commissioner and the Court of Appeal.

2.97 The Act itself is silent on the question of access to and reporting of cases before child support appeal tribunals, although it does include an offence of unauthorised disclosure of information by the officers and staff of such tribunals.[184] The Secretary of State for Social Security has, however, made regulations with respect to proceedings before child support appeal tribunals which cover access and reporting.[185] These provide: for hearings before child support appeal tribunals to be held in private, unless the chairman directs otherwise; for the attendance of certain categories of person at hearings, even though they are in private; and that no information provided for the purposes of the proceedings which could reasonably be

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[183] See paras. 2.51 to 2.53 above.

[184] Child Support Act 1991, s.50. By virtue of s.50(5), this offence potentially extends to court staff where appeals are heard in the courts pursuant to an order under s.27 or s.45.

[185] The Child Support Appeal Tribunals (Procedure) Regulations 1992, regulation 17.

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expected to lead to a person being located shall be disclosed except with the written consent of the person to whom the information relates. Where a child support appeal tribunal sits in private, it will be a contempt to publish information relating to the proceedings as they will relate "wholly or mainly to the maintenance ... of a minor".[186]

2.98 The Lord Chancellor has also made regulations with regard to the procedure for appeals before Child Support Commissioners.[187] These provide that oral hearings before Commissioners should be in public, unless there are special reasons for a Commissioner to direct that the hearing, or part thereof, be in private; and, as with child support appeal tribunals, that there should be non-disclosure of information provided for the purpose of the proceedings except with the consent of the person to whom the information relates.

2.99 Certain proceedings under the Act are also heard in the ordinary courts. This is the case for proceedings under section 27 of the Act for a declaration of parentage for the purposes of child support maintenance. By virtue of the Children (Allocation of Proceedings) (Amendment) Order 1993, such proceedings must be commenced in the magistrates' court, following the Children Act model. In addition, the Lord Chancellor has made an order under section 45 to provide that child support appeals should be made to a court instead of to a child support appeal tribunal when they concern issues of disputed parentage.[188]

2.100 The Act itself is silent on the question of access to and reporting of proceedings under the Act heard in the ordinary courts pursuant to sections 27 and 45. It is, however, intended that proceedings under those sections should fall within the definition of "family business" in section 32 of the Matrimonial and Family

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[186] See the Administration of Justice Act 1960, s.12(1)(a). By s.12(3), references to a court for the purpose of contempt of court under s.12 include references to a tribunal. See further para. 2.31 above.

[187] The Child Support Commissioners (Procedure) Regulations 1992.

[188] The Child Support Appeals (Jurisdiction of Courts) Order 1993.

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Proceedings Act 1984 and Schedule 1 to the Supreme Court Act 1981. Therefore, in relation to proceedings in the High Court and county courts, there is a power to make rules of court for such proceedings under section 40(1) of the 1984 Act, and this will include power to provide for private hearings. Proceedings under the Act heard in private pursuant to any such rules will attract the provisions of section 12 of the Administration of Justice Act 1960, and it will therefore be a contempt to publish information relating to such proceedings.[189]

2.101 Proceedings in a magistrates' court under section 27 or pursuant to an order under section 45 are not "family proceedings" within the meaning of section 65 of the Magistrates' Courts Act 1980.[190] In the absence of any other provision, such proceedings must therefore be heard in open court and without reporting restrictions. However, it would seem that the power of the Lord Chancellor to "make rules for regulating and prescribing the procedure and practice to be followed in magistrates' courts" under section 144 of the 1980 Act will include power to provide for private hearings. As is the position for proceedings in other courts, it will probably be a contempt of court to publish information relating to proceedings under the Act which are heard in private.[191]

2.102 There are other proceedings under the Act, concerned mostly with the enforcement of the payment of maintenance. In certain circumstances where a person is in arrears of child support payments, the Secretary of State may apply to a magistrates' court for a liability order under section 33 of the 1991 Act. These are not "family proceedings" within section 65 of the Magistrates' Courts Act 1980, and so in the absence of any other provision they must be heard in open court without restrictions on reporting. As above, however, section 144 of the 1980 Act may apply here; and even if such proceedings were to be heard in private it is far from clear that section 12 of the Administration of Justice Act 1960 would apply to them. Similarly,

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[189] See para. 2.97 above and, on s.12 generally, see para. 2.31 above.

[190] See para. 2.47 above, and Annex A.

[191] See para. 2.97 above.

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in the absence of any other provision it would seem that proceedings under section 40 of the 1980 Act for committal to prison must be heard in open court without reporting restrictions, although again section 144 might apply.

16. Proceedings for the enforcement of orders made in family proceedings

2.103 This section is concerned with committal proceedings in the High Court and county courts which arise from family proceedings. It also examines proceedings in the magistrates' courts for the enforcement of orders made in family proceedings. There is a further section concerning maintenance enforcement.

(a) Access

2.104 An important method for the enforcement of orders made in family proceedings is by means of an application for an order that the person in breach of the order be committed to prison. In the High Court, applications for an order of committal are normally heard in open court. However, the court may sit in private where:–

(a) the application arises out of proceedings relating to the wardship or adoption of an infant or wholly or mainly to the guardianship, custody, maintenance or upbringing of an infant, or rights of access to an infant;[192] and

(b) where it appears to the court that in the interests of the administration of justice ... the application should be heard in private.[193]

Where the court makes a committal order after hearing the application in private, it must state in open court the name of the person committed, the length of his sentence, and the general nature of his contempt.[194]

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[192] R.S.C. O. 52, r. 6(1)(a).

[193] *Ibid.*, r. 6(1)(d).

[194] *Ibid.*, r. 6(2).

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2.105 In a county court, the procedure for the enforcement of court orders is governed by Order 29 of the County Court Rules 1981. There is no specific provision for the hearing of committal applications to be in private under Order 29. However, it may be that a county court has power to hear these proceedings in private by virtue of section 76 of the County Courts Act 1984.[195] This allows the "general principles of practice in the High Court" to be adopted and applied to proceedings in a county court, where the 1984 Act is silent on the matter. It is far from clear whether this would allow a county court to hear a case in private relying on the provisions outlined above.

2.106 In a magistrates' court, the position as regards access to proceedings for enforcement of an order made in family proceedings may vary. The access provisions described above[196] apply to those proceedings which are "family proceedings" under section 65 of the Magistrates' Courts Act 1980. Section 65(1) contains a list of statutes the proceedings under which are family proceedings. It goes on to provide that, subject to section 65(2), proceedings for the enforcement of any order made, confirmed or registered under any of the enactments listed in section 65(1), are not family proceedings.

2.107 The effect of subsections 65(2) to (4) is as follows. Where a magistrates' court has made an order in family proceedings, and proceedings for the enforcement of this order are heard together with other proceedings with the same parties, then the enforcement proceedings are family proceedings,[197] with the restrictions on access applying. Where proceedings for the enforcement of the order are heard separately from any other family proceedings, or are heard together but with different parties, the court has a discretion to treat the proceedings as family proceedings.[198] Where this

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[195] See also para. 2.76 above.

[196] At paras. 2.47 onwards.

[197] Magistrates' Courts Act 1980, s.65(3).

[198] *Ibid.*, s.65(2).

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discretion is so exercised, the restricted access provisions will apply. There is no appeal against the exercise of this discretion.[199] Where the discretion is not so exercised, the enforcement proceedings are not family proceedings. The court must therefore sit in open court.[200]

(b) Reporting

2.108 In the High Court and county courts, where the application for committal is heard in open court, the general rule will be that no reporting restrictions apply. Even where the Judicial Proceedings (Regulation of Reports) Act 1926[201] applies to the proceedings in which the order is made, it is doubtful that it applies to the proceedings for the enforcement of the order.

2.109 Where the application for committal is heard in private in the High Court, section 12 of the Administration of Justice Act 1960 will apply.[202]

2.110 The position as regards reporting in a magistrates' court is entirely dependent again on whether the proceedings for the enforcement of the order are "family proceedings" under section 65 of the Magistrates' Courts Act 1980. For an analysis of when they are family proceedings, see paragraph 2.107 above. Where the proceedings are family proceedings, the reporting restrictions described in paragraph 2.51 above will apply.[203] When they are not so, no reporting restrictions apply.

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[199] *Ibid.*, s.65(4).

[200] *Ibid.*, s.121(4).

[201] See paras. 2.21 to 2.23 above.

[202] Proceedings, say, for the enforcement of a residence order may not be "brought under the Children Act 1989" within s.12(1)(a)(ii) of the 1960 Act, but will probably "otherwise relate wholly or mainly to the maintenance or upbringing of a minor" within sub-paragraph (iii) of the same subsection. See para. 2.31 onwards, above.

[203] Whether the restrictions under the Children Act 1989 apply will depend on whether any power under the Act may be exercised in the course of the particular enforcement proceedings; see para. 2.52 above.

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17. Maintenance enforcement

2.111 Various enactments relating to the enforcement of maintenance orders fall to be considered here. These include the Maintenance Orders (Facilities for Enforcement) Act 1920, the Maintenance Orders Act 1950, the Maintenance Orders Act 1958, the Maintenance Orders (Reciprocal Enforcement) Act 1972, and the Civil Jurisdiction and Judgments Act 1982. The Acts of 1920, 1972 and 1982 are concerned with the enforcement in courts in England and Wales of maintenance orders made in reciprocating foreign jurisdictions. The 1950 Act is concerned with reciprocal enforcement of orders within the United Kingdom. The 1958 Act allows for maintenance orders made in a magistrates' court to be registered and enforced in the High Court, and for registration and enforcement in a magistrates' court of orders made by the High Court and county courts.

2.112 Applications under the Acts themselves are generally for registration of an order in the court in which it is to be enforced. Applications are of an administrative nature, dealt with by district judges and justices' clerks on the papers, without a hearing. The general rule is that once an order has been registered in a court, the order is enforceable as if it had been made by the registering court. As a result, access to and reporting of proceedings for enforcement of the order will be as for general enforcement proceedings above,[204] depending on the court in which the order is registered. In the magistrates' courts, the access and reporting regime is dependent on the provisions of section 65 of the Magistrates' Courts Act 1980. Proceedings for the enforcement (including attachment of earnings) or variation of an order made, confirmed or registered under any of the five Acts are within section 65(2) of the 1980 Act. This means that the court may order these proceedings to be treated as "family proceedings"; in certain cases, they will automatically be so treated. This aspect is discussed more fully at paragraph 2.107 . Where these proceedings are "family proceedings", access and reporting is as set out above at paragraph 2.47 onwards. Where not, the proceedings must be in open court and without reporting restrictions.

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[204] See para. 2.102 onwards above.

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18. Appeal hearings

(a) Access

2.113 If the court from which the appeal is brought had power to sit in private, the court hearing the appeal also has power to sit in private. Where the appeal court exercises this power to sit in private, it must give its decision and the reason for its decision in public, unless there are good and sufficient grounds for giving them in private and in that case the court must state those grounds in public.[205] Appeals in the High Court from magistrates under section 94 of the Children Act, in the Divisional Court under the Domestic Proceedings and Magistrates' Courts Act 1978 and in the Court of Appeal in children's cases are normally heard in open court. In practice oral evidence is rarely given in appeals in the High Court or the Court of Appeal.

(b) Reporting

2.114 If the court hearing the appeal sits in private, the restrictions under section 12 of the Administration of Justice Act 1960 may apply, depending of course on the nature of the proceedings.[206] The appeal court will also have power under section 39 of the Children and Young Persons Act 1933 to prohibit identification of children concerned in the proceedings.[207] If the Judicial Proceedings (Regulation of Reports) Act 1926 applied at first instance, it would also apply on appeal, since the restrictions apply to any judicial proceedings.[208]

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[205] Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968, s.1(1), 1(2). Appeals from magistrates' courts to the High Court under s.94 of the Children Act 1989 are "normally" to be heard in open court; see Practice Direction (Family Division: Appeals from Justices) [1992] 1 W.L.R. 261.

[206] See paras. 2.31 to 2.42 above.

[207] See paras. 2.24 to 2.26 above.

[208] See paras. 2.21 to 2.23, 2.29, 2.83 and 2.90 above.

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The enforcement of reporting restrictions

2.115 Typically, reporting restrictions are enforced through the criminal law or the law of contempt of court. Often, the statute limits the persons who may commit the offence to those working in the media, or some parts of the media. The restrictions in the Magistrates' Courts Act 1980 apply only to publications in newspapers, periodicals and the broadcast media, while anyone may commit the offence under section 97 of the Children Act 1989. The restrictions under the 1926 Act apply only to those concerned with certain publications, but are not limited to those publications.[209] Where publication is a contempt of court however, all are bound by the restriction, including counsel for parties to the case.[210]

2.116 Not only are there discrepancies as to the range of persons bound by the restrictions, but there are also differences as to who may enforce the bans. The Attorney-General's sanction is required for prosecutions under the 1926 Act and the 1980 Act,[211] but not for those under the 1989 Act. It would seem that where publication would be a contempt of court, either because it discloses information relating to proceedings or because it relates to information obtained otherwise than in accordance with the rules, any party to the proceedings concerned may bring proceedings for the contempt.[212]

2.117 Private individuals may also seek to bring civil actions in order to enforce the restrictions. Two general principles are relevant. First, subject to minor

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[209] See para. 2.22 above.

[210] See para. 2.33 above.

[211] Judicial Proceedings (Regulation of Reports) Act 1926, s.1(3); Magistrates' Courts Act 1980, s.71(4).

[212] In Dobson v. Hastings [1992] 2 W.L.R. 414, Sir Donald Nicholls V.-C., the applicant was a party to the proceedings in respect of which the journalist had obtained access to the court file, though there was a query as to his locus standi; see p. 428. In Re F. (A Minor) (Publication of Information) [1977] Fam. 58, the contempt proceedings were instituted by the Official Solicitor, who was the guardian ad litem in the proceedings to which the information published related.

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exceptions, public rights can only be enforced by the Attorney-General.[213] Second, where a statute creates a prohibition and provides only for a criminal penalty, there is no civil action on the statute unless the prohibition was imposed for the benefit of a particular class of individuals.[214]

2.118 In Argyll v. Argyll,[215] Ungoed-Thomas J. granted an interlocutory injunction against the Duke of Argyll and The People newspaper from publishing certain matters. One of the grounds for granting the injunction was that publication would be in breach of the 1926 Act. The judge held that, despite the first principle referred to above, the Duchess was entitled to an injunction because the 1926 Act fell within the second principle. The 1926 Act was held to be passed for the benefit of those involved in divorce proceedings.

2.119 There are difficulties with this judgment – which was only a decision on an application for an interlocutory injunction – which relate to the extent of the class protected and the approach taken to the construction of the 1926 Act. But in spite of these difficulties, it is at least arguable that the restrictions in the 1980 Act and 1989 Act can also be enforced by private law actions and, given the test for the grant of interlocutory injunctions, an injunction may well be granted.[216] Whether or not these Acts can be so enforced depends entirely on their construction.[217] However, the recent decision of the House of Lords in P. v. Liverpool Daily Post[218] suggests that a court is unlikely to follow Argyll v. Argyll. Lord Bridge remarked:-

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[213] Gouriet v. Union of Post Office Workers [1978] A.C. 435.

[214] Lonhro Ltd. v. Shell Petroleum Co. Ltd. (No. 2) [1982] A.C. 173. The principal speech was given by Lord Diplock.

[215] [1967] Ch. 302, especially at pp. 341-343.

[216] The plaintiff need only prove that there is a serious question to be tried, and that the balance of convenience lies with the grant of the injunction. See American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396.

[217] See Cutler v. Wandsworth Stadium Ltd. [1949] A.C. 398, 407 *per* Lord Simonds.

[218] P. v. Liverpool Daily Post and Echo Newspapers plc. [1991] 2 A.C. 370.

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> "I know of no authority where a statute has been held, in the application of Lord Diplock's principle [in Lonhro v. Shell], to give a cause of action for breach of statutory duty when the nature of the statutory obligation or prohibition was not such that a breach of it would be likely to cause a member of the class for whose benefit or protection it was imposed either personal injury, injury to property or economic loss. But publication of unauthorised information about proceedings ..., though it may in one sense be adverse to (his) interest, is incapable of causing him loss or injury of a kind for which the law awards damages. Hence Lord Diplock's principle seems to me to be incapable of application to (the particular provision concerned)."[219]

2.120 The discussion above is necessarily uncertain and abstract. It may not be considered appropriate for restrictions on the freedom of the press to be based solely on the ramifications of one judgment at first instance at an interlocutory stage. On the other hand, if part of the object of the restrictions is to protect individuals, including children, there may be a case for allowing them to obtain, if not damages, at least an injunction to prohibit their breach. The question of who should be able to enforce restrictions on access and reporting is discussed further at paragraphs 4.56 to 4.66 below.

Tables

2.121 We have produced two tables which illustrate at a glance the position for access and reporting under current law. They can be found at Annex B (tables 2 and 3). However, out of necessity there has been some simplification of detail, and the tables should not therefore be relied upon as providing a complete picture of the law.

European Convention on Human Rights

2.122 Several issues relevant to this review are affected by the European Convention on Human Rights. The individual's right to a public hearing is governed by Article 6. Media access and reporting are governed by Article 10, which

[219] *Ibid.*, at p. 420. The other Law Lords all agreed with the single speech of Lord Bridge.

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guarantees freedom of expression, and this must also take account of the individual's right to respect for private and family life under Article 8. Our view is that the present law is in accordance with these Articles, and the Convention is not likely to restrict greatly the range of options for reform. Article 13, however, requires there to be an effective means under domestic law for the media to challenge access or reporting restrictions. For further discussion of this issue, see paragraphs 4.67 to 4.70 below. A full analysis of the law of the Convention relevant to this review may be found in Annex C.

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PART III

THE ARGUMENTS

3.1 This Part sets out the arguments for conducting family proceedings in public or in private, and for and against open reporting of family proceedings. It starts with a discussion of the reasons why, in principle, open justice is generally favoured. There then follows an examination of the arguments for adopting a different approach in family cases.

3.2 We have considered it important to set out the arguments on either side at some length. This is because the purposes to be achieved by privacy or publicity will largely determine whether there should continue to be restrictions on public access to and reporting of family proceedings and, if so, their nature and extent.

Open justice

3.3 "Publicity is the very soul of justice. ... Where there is no publicity there is no justice." The words of Jeremy Bentham found judicial approval in 1913, when the House of Lords established the rule that justice must be administered in open court.[220] The justifications for open justice appear to include the following:–

(a) enabling scrutiny of the administration of justice;
(b) enabling public discussion of matters of public interest that come before the courts; and
(c) facilitating public knowledge of and interest in the proceedings of courts of law.

We have not felt it necessary to cite freedom of expression as a justification in itself. The right to freedom of expression, guaranteed by Article 10 of the European

[220] Scott v. Scott [1913] A.C. 417. The passage cited was endorsed by Lord Shaw at p. 477.

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Convention on Human Rights,[221] is clearly central to each of the arguments listed above. The list is not, however, necessarily complete and we would welcome further reasons or arguments which we may have overlooked or undervalued.

(a) Scrutiny of the administration of justice

3.4 This particular justification for open justice has been given the most prominence by the judiciary themselves over the years. Lord Shaw in Scott v. Scott[222] put great emphasis on this reason, citing Bentham: "Publicity ... is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial."[223] This approach received a more recent endorsement from Lord Diplock: the "reason for the rule is to discipline the judiciary, to keep the judges themselves up to the mark".[224]

3.5 Open justice thus serves the purpose of enabling public scrutiny of those on the bench. Such scrutiny operates to reduce the risk of judgments based on irrelevant considerations or on the personal values or prejudices of the judiciary rather than on the law and the evidence presented. This risk is not large but it is certainly as great and may be greater in family cases than in other civil cases.

3.6 The scrutiny of the administration of justice which open justice allows extends not only to the scrutiny of individual judges and magistrates but also to the public administration of justice as a whole. Without open justice, confidence in the administration of justice may be reduced. In 1987, Mrs Justice Booth severely criticised the automatic exclusion of the press from chambers hearings of ancillary

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[221] For an analysis of the law of the European Convention on Human Rights relevant to this review, see Annex C.

[222] [1913] A.C. 417.

[223] *Ibid.*, at p. 477.

[224] Home Office v. Harman [1983] 1 A.C. 280, 303. See also Attorney-General v. Leveller Magazine Ltd. [1979] A.C. 440, 450.

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relief proceedings. The privacy of the hearings was said to have resulted in "lax and sloppy advocacy".[225] Public scrutiny thus extends to the legal profession. Lord Scarman has identified yet another aspect of open justice: "the evidence and argument should be publicly known, so that society may judge for itself the quality of justice administered in its name, and whether the law requires modification."[226]

3.7 Open justice also allows the public to examine the way the administration of justice is operating. A large number of people work in the courts: their efficiency, and that of all those involved in the court process will, to an extent, be reflected in the length of delays and will come to light when cases are heard in court. With the introduction of the Citizen's Charter, and greater concern over the quality of public services, this aspect of the scrutiny allowed by open justice may be of greater relevance than previously.

(b) Discussion of matters of public interest

3.8 Historically, the judiciary have seen this as a less important reason for open justice than that of scrutiny of the administration of justice. However, this reason is growing in significance. A great many important issues are decided by the courts, and public discussion of these issues is essential for a healthy democracy. Citizens require access to information on the issues of the day in order to exercise a meaningful political freedom, whether that is expressed as a vote for a particular party, or in other political activities.

3.9 The media play a vital role in the conveying of information to the public at large. The importance of their role has received judicial recognition:

"The 'media', to use a term which comprises not only the newspapers,

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[225] Speech at Annual Conference, Family Law Bar Association, 1987; see the report in (1987) 137 N.L.J. 444, and the discussion in G. Robertson, Freedom, the Individual and the Law (6th ed., 1989), pp. 281-282.

[226] Home Office v. Harman [1983] 1 A.C. 280, 316.

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but also television and radio, are an essential foundation of any democracy. In exposing crime, anti-social behaviour and hypocrisy and in campaigning for reform and propagating the views of minorities, they perform an invaluable function."[227]

3.10 The matter of what constitutes a question of public interest is a vexed one. It cannot simply be equated with what the public finds interesting. Many people find the stories of people involved in family cases of considerable interest, but this does not necessarily mean that there is an issue of major importance involved. Nevertheless, some family cases do involve matters of very deep public concern, and publication of matters of public interest may often be desirable despite claims of privacy or confidentiality to the contrary. The question of which should prevail, the public interest or the claims of individuals, requires a careful balancing act. However, the two may well be reconciled by allowing reporting, at least of the court's decision and the reasons for it, but in a way which preserves the anonymity of those involved. All of these issues are discussed below in Part IV.

(c) Facilitating public knowledge of proceedings in courts

3.11 This justification for open justice is really concerned with enabling members of the public to know what goes on in court, how court proceedings operate and such like. There is an overlap to an extent with (b) above, but the emphasis here is not on matters of public interest, but the ability of ordinary people (and scholars) to familiarise themselves with the way the courts work. Open justice therefore also serves an educative function, enabling litigants who are soon to have their cases heard, for example, to obtain first hand experience of court-room atmosphere and the way court proceedings are conducted. Anything which puts litigants at their ease so that they feel comfortable in court is likely to be beneficial to them and the administration of justice in general.

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[227] Francome v. Mirror Group Newspapers Ltd. [1984] 1 W.L.R. 892, 898 *per* Sir John Donaldson M.R..

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Privacy

3.12 Justifications for departing from the general rule of open justice stem from the premise that there are fundamental differences between family proceedings and other types of proceedings. Much of family law is not concerned with rights and obligations but with providing practical solutions by means of discretionary remedies. More often than not the matters that come before the courts will touch on personal matters and the details of family relationships. Such matters may well fall within the scope of "private and family life", respect for which is guaranteed by Article 8 of the European Convention on Human Rights.[228]

3.13 Reasons for restricting access and reporting would appear to include the following:–

(a) to protect children from harmful publicity;
(b) to provide an informal atmosphere for hearing the evidence;
(c) to respect the privacy and dignity of those seeking a remedy from the court;
(d) to enable justice to be done where people might otherwise refrain from seeking a remedy for fear of publicity; and
(e) to protect public morals.

These are all discussed in turn below. Again we would welcome hearing of any further arguments which are thought to justify departure from the principle of open justice.

(a) Protecting children from publicity

3.14 Many of the restrictions presently found in the law would appear to be based on this ground. It seems to be the generally accepted wisdom that publicity is harmful to children's welfare and that they should therefore receive special protection. A clear–cut example of where publicity would have been prejudicial to a child's welfare

[228] Article 8 is among the matters discussed in the analysis of the law of the European Convention on Human Rights in Annex C.

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was found in Re. X (A Minor) (Wardship: Injunction).[229] In 1968, at the age of 11, Mary Bell was found guilty of the manslaughter of two infants. She was sentenced to detention for life but was released on licence in 1980. Upon her release she assumed a new identity, and in 1984 gave birth to a daughter. The daughter was made a ward of court, and an injunction was granted prohibiting publication of any details which would enable the identification of Mary Bell, the child or the child's father. The court granted the order because of the likelihood that publicity would be detrimental to the stability of the new family's home and therefore damaging to the child's welfare.

3.15 The harm that may be caused to children following publication of details of court proceedings may, however, be less obvious. For example, parents might refuse to allow their own children to mix with a child whom they knew to be a victim of child abuse, or an abused child might be subject to ridicule or taunts from his school peers. In either situation it is easy to imagine the effect which this might have on the child involved. Restrictions on access and reporting may therefore be justified in order to reduce the risk of harm to the welfare of children.

(b) Informal atmosphere

3.16 As stated above, much of family law consists of providing practical solutions to the various family situations which have given rise to proceedings. In a high proportion of cases, the court's function is to assess what is the best course of action for the future, particularly where the upbringing of children is directly or indirectly involved. Private hearings may contribute to a more relaxed and informal atmosphere which is less stressful for the parties and witnesses and which may encourage openness and frankness in their evidence. This in turn may enable the court better to assess the character and personalities of the persons involved, facilitating the decision-making process in matters where sensitive and emotionally charged family issues are under consideration.

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[229] [1984] 1 W.L.R. 1422, Balcombe J.

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(c) Dignity and privacy

3.17 The matters that come before the courts which handle family business tend to be sensitive ones concerning personal affairs and family relationships. The law protects marital confidences,[230] and may well protect the confidences of other family relationships. In seeking the assistance of the courts to regulate these family relationships, it may seem harsh that those involved should forfeit the protection they might otherwise receive. This is particularly so where the law requires them to seek a judicial resolution of matters which they might prefer to resolve in other ways. Indeed, the very fact that the parties are seeking a judicial remedy may point to a greater need for such protection. Restrictions may therefore be justified in order to respect the dignity and privacy of those who are required in court to recount the details of their personal life and family relationships.

(d) The deterrent effect

3.18 Though this is linked to the justification set out at (c) above, it is also a ground for restrictions in its own right. The knowledge that proceedings may be heard in public and/or reported may deter certain people from seeking a judicial remedy to which they are entitled. The danger of this was recognised by the Law Commission following a case where a litigant declined to continue legitimacy proceedings after it was held that the court had no power to sit in private.[231] The Law Commission was of the opinion that it was:

> "wrong in principle and liable to result in a denial of justice that people should be deterred from establishing their legitimacy or that of their children through a reasonable fear of the adverse effects that publicity may have on the children".[232]

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[230] See Argyll v. Argyll [1967] Ch. 302.

[231] B. (orse P.) v. Attorney-General [1967] P. 119.

[232] See the Report on the Powers of Appeal Courts to Sit in Private and the Restrictions upon Publicity in Domestic Proceedings, Law Com. No. 8, p. 18.

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It recommended a change in the law and legislation was passed to permit private hearings and restrict reporting.[233]

3.19 This ground for restriction is not concerned with any claim of the litigant to privacy. It is, however, concerned with encouraging the use of available judicial remedies, thereby avoiding the risk of injustice to someone who fears publicity. It could be said to be the same justification as provides for the anonymity of complainants of rape and other sexual offences. Restrictions thus serve to prevent injustice and to ensure that those at risk are not discouraged from seeking the courts' protection.

(e) Public morality

3.20 Restrictions based on this ground stem from a different society from today's. They do, however, still form part of the current law.[234] The Calcutt Committee, while concentrating on privacy and its relationship with press freedom, mentioned in passing its concern over stories which were in exceptionally bad taste, but acknowledged the arguments relating to the dangers of censorship on the grounds of taste or morality.[235]

3.21 Restrictions on the ground of public morality are far less common than formerly but may still be of some, albeit limited, relevance. In the past there have, for example, been reports of the circulation among paedophiles of written statements of children's testimony of sexual abuse. While such reports have, so far, been limited to criminal proceedings, there is no reason to suppose that the potential does not exist for traffic in similar statements arising out of family proceedings. Some divorce and child abuse cases, for example, may involve allegations of extreme violence or behaviour which verges on the pornographic. Where this is so, the conduct alleged

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[233] The Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968.

[234] See the Judicial Proceedings (Regulation of Reports) Act 1926, s.1(1)(a).

[235] Report of the Committee on Privacy and Related Matters, (1990), Cm. 1102, paras. 3.10 and 3.11.

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is likely to be a factor in determining the case. So it is possible – and surely objectionable – that the evidence presented for the resolution of such an issue could be exploited for its pornographic value.

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PART IV

OPTIONS FOR CHANGE

The need for change

4.1 Our examination of the current law and practice has shown that there are many inconsistencies and anomalies and has highlighted the fragmentation of the law in this area. To discover the legal position it is necessary to look at a range of different statutory provisions, depending upon the nature of the proceedings and the level of court; and sometimes the law varies not only as between different types of proceedings but also in respect of the same proceedings across different levels of court.

4.2 The creation of a concurrent jurisdiction under the Children Act 1989, allowing as it does for the transfer of proceedings between the magistrates' courts, the county courts and the High Court, makes it important for the provisions relating to access and publicity to be consistent as between different levels of court. It makes little sense for a case to be subject to one regime for access if heard in the magistrates' court and to another if transferred to a county court or the High Court: that has in effect been the position since the Children Act was implemented in October 1991.

4.3 As has already been mentioned, the force of argument in favour of consistency was recognised by the Calcutt Committee in its Report.[236] The Committee considered that a single set of prohibitions on identifying minors would make the task of the press reporter and editor easier, and recommended that consideration be given to amending legislation to eliminate inconsistencies or uncertainties. We believe that the need to be able to discover the position without difficulty extends, however, beyond the media to the courts, to legal practitioners and

[236] See para. 1.7 above.

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to the parties to proceedings themselves. This is especially so since many of those involved will be justifiably preoccupied with the substantive issues in the case rather than with side issues such as access and reporting.

4.4 We believe, therefore, that there is a need for rationalisation to remove unnecessary inconsistency and complexity and to provide rules which are as clear and uncomplicated as possible, while retaining flexibility where necessary. We are not, however, at present aware of any significant dissatisfaction with the current balance between openness and privacy and therefore do not consider there is a need to make change for its own sake.[237]

4.5 As regards reporting, it needs to be borne in mind that in general the ability to report proceedings will depend upon whether access is permitted. The question of what may be reported is dealt with at paragraphs 4.33 onwards.

Access: suggested options

4.6 The current legislation gives the misleading impression that in the High Court and county courts proceedings are normally in public, whereas in practice they are normally in private.[238] It seems to us to be more straightforward if the legislation sets out clearly the position which is intended to have general application. Therefore, if there is to be a general presumption, whether that proceedings should be in public or in private, we would expect the legislation to set out the presumption and we would expect it actually to operate in a good majority of instances.

4.7 In the light of the current law and of the arguments set out in Part III, we now suggest five options for consideration:-

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[237] The Calcutt Committee did not make any recommendation that statutory provisions in respect of children should be tightened or relaxed, having received no evidence on the subject; see para. 10.5 of the Committee's Report.

[238] See the table on access to family proceedings at Annex B.

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(1) no access;

(2) presumption of private proceedings but power to allow access;

(3) restricted access (i.e. assimilation to the magistrates' courts position);

(4) presumption of public proceedings but power to restrict access;

(5) unrestricted access.

After setting out the options, we go on to discuss the factors which might displace the presumptions in options 2 and 4, as well as access to committal and appeal hearings and the issues of reporting and challenges.

4.8 We should mention here that we considered the possibility of distinguishing cases in which children were involved from those involving adults alone. This might have been possible by, for example, applying option 2 to cases involving children and option 3 or 4 to those solely concerning adults. However, we have concluded that this is not feasible because issues concerning children are often inextricably linked with matters which might on the face of it be thought just to concern adults. Further, applications under the Children Act may be made in the course of other, 'adult', proceedings making any distinction between child and adult proceedings virtually unworkable. Another reason is that even though children might not be directly involved in proceedings, there is still the potential for them to be harmed by publicity about them.[239]

Option 1: No access

4.9 There may well be some who would argue from the propositions in paragraphs 3.12 to 3.21 above that family proceedings should always be conducted in private and therefore never be reported. They would point, for example, to the need to protect children from harmful publicity, to the highly personal matters discussed in family proceedings and to the need to ensure an atmosphere conducive to the hearing of evidence. However, notwithstanding the validity and weight of these arguments, we

[239] See para. 4.12 below.

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do not regard this to be a viable option. It would impose restrictions which do not exist at present, and it completely ignores the arguments in favour of open justice. The need to enable scrutiny of the administration of justice, to enable public discussion of cases of public interest which are before the courts and to facilitate public knowledge of, and promote interest in, the proceedings of courts of law are important matters which should not be overlooked or subverted in a healthy democracy.

4.10 Furthermore, a total ban on access would prohibit even law reporters from being able to report family cases and prevent the court from allowing publicity where this was thought to be in the interests of the child, for example in a child abduction case. We consider it likely that the case for allowing reporting of family proceedings will in many instances be far stronger than the case against, and therefore reject this option.

Option 2: Presumption of private proceedings but with power to allow access

4.11 A more realistic option, although one which would mark a major departure for magistrates' courts, would be to align all family proceedings with the current position in the High Court and county courts where the great majority of cases are heard in private, but where access may be allowed in appropriate cases.[240] Thus the 'chambers' or private system might be extended to cover other types of family proceedings such as divorce, judicial separation and nullity: defended divorce and nullity cases do not constitute a large volume of work[241] and special procedure divorce cases are in effect already dealt with in private, save for public pronouncement of the decree.

4.12 In support of this, it may be argued that divorce, residence, access and financial support disputes are essentially private quarrels and that no special public

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[240] See the tables on access and reporting of family proceedings at Annex B.

[241] See the table on judicial statistics at Annex B.

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interest is served by exposing them to the public gaze and the glare of publicity in the media. Furthermore, public knowledge of their details may harm children even though they themselves are not directly involved in the proceedings. The received view is that publicity may harm children's welfare and that they should be protected from it. There is, therefore, a case for arguing that privacy rules be extended to include proceedings which might affect children even though they are not directly involved in the proceedings themselves.

4.13 As regards nullity, there is already provision for evidence on the question of sexual capacity to be heard in private, and it may be the case that most nullity petitions are currently heard in private anyway. A move to closed courts for the hearing of nullity petitions could be justified on the basis of the arguments at paragraphs 3.12 to 3.21 above; but in any event there would seem to be little justification for differentiating between the sensitivity of evidence relating to sexual capacity and that which relates to the wilful refusal to consummate.

4.14 A general presumption that family proceedings should be heard in private would also require certain proceedings in magistrates' courts to be approximated to those in the higher courts. These would include proceedings for failure to maintain, family protection orders, proceedings for the court to consent to the marriage of minors and Children Act cases, although the latter may be heard in private.[242] All of these proceedings are currently heard in private when dealt with in the higher courts, so it may be argued that the reasons for privacy in those courts are equally valid and compelling for the same proceedings in the magistrates' courts. Furthermore it may be argued that such a change is justifiable on the basis of consistency between courts.

4.15 All in all, a presumption that family proceedings should be heard in private would provide a clear and simple rule which would not result in an overall position very different from that which currently exists in practice. We discuss at paragraphs 4.21 to 4.24 and 4.28 below the criteria according to which courts would

[242] See para. 2.45 above.

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be expected to grant access.

Option 3: Restricted access

4.16 A third option would be to assimilate all family proceedings to the position of family proceedings in magistrates' courts under the Magistrates' Courts Act 1980. This option can perhaps best be described as one of restricted access – whereby the general public are not allowed access, but the media are – subject to exclusion in certain circumstances.[243]

4.17 Although such an approach would effectively extend a scheme which already operates in one tier of courts it would, however, represent a major departure from the present practice in the higher courts, even in non–sensitive cases concerning children and ancillary relief. The advantages of such an approach, if adopted wholesale without any change, would be that the judiciary would not be required to consider in every case whether access or reporting was merited; and that scrutiny of the administration of justice and of the legal profession would be assured. A major disadvantage, however, would be the difficulty in ensuring an atmosphere conducive to the free and frank expression of perhaps sensitive or embarrassing evidence by the parties or witnesses, with resultant difficulties for the court in the assessment of character and personalities and consequential implications for the proper administration of justice. There might, therefore, be a case for combining the magistrates' court approach with a discretion to open or close the court in certain circumstances according to defined criteria.[244] If such were to be the case, we believe this option would be worthy of consideration.

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[243] For further details see paras. 2.47 to 2.52 above

[244] See paras. 4.27 and 4.28 below for details of the criteria which might apply.

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Option 4: Presumption of public proceedings but with power to restrict access

4.18 This fourth option has its foundation in the principle of open justice (paragraphs 3.3 to 3.11). This serves the purpose of enabling public scrutiny not only of those sitting on the bench but of the whole administration of justice, as well as promoting greater confidence by members of the public and litigants in the court process. Under this option there would be a general presumption that proceedings would be conducted in public, but with a power to restrict access. Such an approach does not, however, currently operate across any tier of court and so would mark a radical departure from existing law and practice.

4.19 A general presumption that proceedings should be heard in public need not necessarily require, however, that courts should be open in every case: exceptions would need to be made for particular types of case(s) or parts of cases, so that they could be heard in closed court (for example where the need to maintain secrecy or confidentiality or the interests of privacy or delicacy required).[245] There might be a problem with this, however, insofar as it would not be possible in every case to predict at the outset of the proceedings that sensitive material would be likely to emerge. Such a prediction would often be possible, based upon a consideration of the papers or the nature of the case involved, but there would undoubtedly be cases where a court could not reasonably foresee the sensitivity of material with sufficient certainty to impose restrictions until that material had in fact emerged in open court.

Option 5: Unrestricted access

4.20 As with option 1, we mention this option for the sake of completeness. We believe that there are many cases in which it would be totally inappropriate for the reasons set out in paragraphs 3.12 to 3.21 above for the proceedings to be open to

[245] See paras. 4.25 to 4.26 and 4.28 below for discussion of the factors which may give rise to displacement of the presumption of public proceedings.

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the public. The option does not in any way balance the need for open justice against the need to ensure that sufficient privacy is maintained in family proceedings so that the parties and witnesses do not feel that they are on display, children are protected from harmful publicity, and parties who may be vulnerable to the irresponsible exploitation of their affairs by certain sections of the media may be protected. In addition, the history of the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968 illustrates the need for privacy in some cases to prevent possible injustice.[246] For these reasons we do not regard this option as viable.

Displacement of the presumptions (options 2 and 4)

4.21 Options 2 and 4 both start with general presumptions – of private and public proceedings respectively – but provide for the exercise of a power to override the presumption and either allow or restrict access and reporting. In both cases, therefore, it is necessary to address the following questions: on what basis should that power be used, by whom and in favour of whom?

Option 2

4.22 Where family proceedings are in general to be heard in private, the following would generally be entitled to be present: the parties, their legal representatives, officers of the court and other persons directly involved in the case (e.g. social workers, guardian ad litem etc.). There might, however, be other persons who would have a legitimate interest in being present: such people might include law reporters, researchers, trainee guardians ad litem and trainee social workers. It might sometimes also be appropriate for the media or members of the general public to be permitted to attend.

4.23 With a presumption that the proceedings should be heard in private, it would be for the court to decide whether others should be allowed to be present in

[246] See para. 3.18 above.

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court and when. The court could raise the issue of who should be allowed to attend of its own motion, or make its decision following an application by a party to the proceedings, or any other person who showed a good reason, including a member of the media or a researcher. The grant or refusal of access would not necessarily affect reporting restrictions.

4.24 At present, in cases heard in private, the judge has an unfettered discretion to allow access to whomsoever he chooses. We believe, however, that the wide discretion given to the court under option 2 should be guided by statutory principles. This would assist the court, the parties and all those with an interest in access to such proceedings. It would also aid consistency. The following are examples, but not necessarily an exhaustive list, of factors which might form the basis for a checklist to assist the court in deciding whether to exercise its power to allow access:

(i) the case involves matters likely to be of substantial public interest (e.g. the sterilisation of a teenage girl under mental incapacity; a local authority's placement of a child with lesbians or gay men; or the termination of a teenage girl's pregnancy);

(ii) the views of all the parties including a mature child;[247]

(iii) the interests of the child(ren) involved require it (e.g. child abduction cases);

(iv) an individual has a genuine and legitimate interest in attending the proceedings (e.g. research, training).

Option 4

4.25 Where the general presumption is that family proceedings should be open, the basic assumption is that anyone may attend. As with Option 2, it would be

[247] I.e. a child who has achieved "a sufficient understanding and intelligence to enable him or her to understand fully what is proposed"; see Gillick v. West Norfolk and Wisbech Area Health Authority [1986] A.C. 112, 189 *per* Lord Scarman.

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for the court to direct that a person or class of person should be excluded and for what period, exercising this power either of its own motion or on an application by a party to the proceedings, or any other person who showed a good reason, including a member of the media or a researcher. Again, the exercise of this power would not necessarily have any effect on reporting restrictions. Such a scheme would enable the court to direct, for example, that only the parties, their legal representatives, witnesses and court officials remain; but also to distinguish between other classes of person so that, for example, bona fide researchers and official law reporters could remain but the general public and media could be excluded.

4.26 As at paragraph 4.24 above, we believe that where there is a power to restrict access there should be statutory principles or guidelines to direct its exercise. Accordingly, the following are examples of factors which could be included in a checklist for use by the court in considering the displacement of the presumption that proceedings should be heard in public:–

(i) the need for total confidentiality (e.g. in some adoption proceedings the need to preserve the identity of the adoptive parents from the birth parents);

(ii) where certain evidence is to be given (e.g. by or about a child, or evidence as to sexual capacity in nullity proceedings);

(iii) where there is a genuine need for privacy in sensitive cases (e.g. child sexual abuse).

Option 3

4.27 With option 3, the starting position would be that the press but not the general public were allowed to attend. If, however, this approach were to be combined with a discretion to open or close the court in certain circumstances,[248] the factors relevant to options 2 and 4 above would also apply here.

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[248] See para. 4.17 above.

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A possible checklist

4.28 The discussion in the previous paragraphs leads us to suggest that the following factors might be included in a checklist to which a court should have regard when considering whether a general presumption should be overridden in a particular case:–

(a) the nature of the proceedings;
(b) the person seeking access and his reason for seeking access;
(c) the welfare of any child concerned in or affected by the proceedings;
(d) the wishes of the parties to the proceedings (including a mature child); and
(e) whether or not the proceedings raise a matter of public interest.

Access to committal proceedings

4.29 The main method of enforcing a non–money order made in family proceedings is by means of an application for the person in default of the order to be committed to prison.[249] In the High Court and county courts, such applications are usually heard in open court, as they are in other types of proceedings. The potential penalty for the alleged contemnor, who is at risk of deprivation of his or her liberty, is one reason for holding such proceedings in public. In addition, committal proceedings which are heard in public may have a deterrent effect, both in the individual case and more generally.

4.30 There is, however, an exception to this general rule where the proceedings relate wholly or mainly to wardship, adoption or the guardianship,

[249] While a magistrates' court has no general power to commit for contempt of court, it does have power under s.63 of the Magistrates' Courts Act 1980 to commit a person who is in default of a non–money order.

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maintenance and upbringing of minors;[250] and it is our understanding that this power to hear committal proceedings in private is exercised in practice, certainly in the High Court (although there are no statistics available to substantiate this). Given that the power to hear committal proceedings in private in certain circumstances already exists, the question arises as to whether it should be extended to other types of family proceedings for consistency's sake. We take the view that considerations such as the need to ensure a fair hearing and the deterrent effect do not justify a different approach for committal hearings in family matters generally, although we recognise that there might be a need for reporting restrictions.[251]

Access to appeal hearings

4.31 There would appear to be two principal options for dealing with the question of access to cases heard on appeal. The first would maintain the current position, which provides that the appellate court may sit in private if the court of first instance had power to sit in private.[252] This could apply if any of options 1 to 4 (see paras. 4.9 – 4.19 above: option 5 does not provide for the court of first instance to sit in private) was ultimately selected, providing a uniform approach in all cases.

4.32 The second option would be to have a separate regime for access to cases heard on appeal. This might provide that all appeal cases should be heard in open court, subject perhaps to a very few exceptions.[253] Such an approach would recognise that appellate proceedings are of an essentially different nature from hearings at first instance. It is rare for an appeal court to hear any oral evidence, and so the argument for privacy in order to provide an informal hearing carries much less

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[250] This power is expressed in terms only in relation to committal proceedings in the High Court. It is not clear whether this power extends to such proceedings in a county court. On this, and access to enforcement proceedings in a magistrates' court, see further paras. 2.103 to 2.107 above.

[251] See below at paras. 4.47 to 4.54.

[252] Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968, s.1(1).

[253] See para. 4.26 above for an indication of the sort of circumstances where it might be appropriate to close an open court.

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weight. In addition, appeals tend to raise important issues of law or of principle, and so the arguments for open justice are very much stronger. As with any first instance proceedings heard in public under one of the above options, any concerns for privacy could be met through restrictions on reporting.

Reporting

4.33 The issue of reporting family proceedings is more complex than that of access. This can be seen in the greater variety of reporting restrictions which currently apply.[254] For instance, the court has a general power to order that a child should not be identified, whereas in some proceedings in magistrates' courts the child concerned may not be identified unless there is a direction to the contrary. Reports of divorce proceedings are limited to certain details. The same is true of family proceedings in the magistrates' courts: only the bare bones of the order made and the names of parties to the proceedings may be published in respect of some proceedings heard in private. Further, the High Court has power to ban the publication of any information about a child, whether or not it relates to proceedings, for the protection of the child's welfare. The different sources of these restrictions mean that there is widespread inconsistency as to the persons bound by the restrictions, as well as the consequences when restrictions are not observed. These two issues are discussed later on in this Part.[255]

4.34 Unlike for access above, we have not set out individual options for reporting below. There are several inter-related questions which generate a sizeable number of distinct options. The principal issues are, first, whether the persons involved in or affected by proceedings should be protected from identification and, secondly, what particulars of proceedings should be allowed to be published.

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[254] See Part II for full details.

[255] See para. 4.56 onwards below.

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(1) Identification

4.35 There are a number of issues concerning the identification of people involved in family proceedings. These include whether protection should be given to either children or adults, or both; whether protection from identification should be automatic and apply in all cases, or merely where the court in its discretion considers it appropriate; whether protection should extend only to parties, witnesses and those who are the subject of proceedings, or whether anyone affected by the outcome of the proceedings should come within the protection; and whether the court should have power to issue directions in order to clarify the effect of any ban in force. These issues are addressed in the paragraphs that follow.

(a) Ban on identifying children

4.36 At present, all courts have a power to ban the identification of children "concerned" in the proceedings.[256] A child is "concerned" in the proceedings if he or she is the person by or against or in respect of whom the proceedings are taken, or if he or she is a witness in the case. The ban on identification covers the newspapers and the broadcast media. The ban means that not only the child, his address and school cannot be published in the media, but also any particulars calculated to lead to his identification. In addition, in certain proceedings in a magistrates' court there is an automatic ban on identifying a child concerned.

4.37 Should there continue to be provision for banning the identification of children? There seems to be a widespread consensus that there will continue to be cases where identifying a child would be harmful to his welfare. If it is accepted that there should continue to be some form of protection for children, it is necessary to consider what form this protection should take. The present law contains an automatic ban in some cases, and a discretionary ban in all others. Should there be an automatic ban in all child cases? In line with the recommendations of the Cleveland

[256] See para. 2.24 onwards above.

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Report, we are sympathetic to an automatic ban on the identification of children involved in all family proceedings. There is a strong case for the view that the protection of children from the harm that can result from publicity should not be left to the discretion of the courts, however vigilant they may be. The present position may cause difficulties where, say, a care case is transferred between a magistrates' court, where there is an automatic ban, and a county court, where there is no ban unless and until the court orders one. An automatic ban in all cases would thus be justified on grounds of consistency.

4.38 The question also arises as to the extent of the class of children protected by the ban. At present, the court can only order a ban where the child is a witness in, a party to or the subject-matter of the proceedings. It has been suggested above[257] in relation to the decision to allow or deny access to the courtroom, that the court should have regard to the welfare of any child who is concerned in or affected by the proceedings. Should the ban therefore also extend to publication of the names of the child's parents where the child is not "concerned" in the proceedings, but where publication might be detrimental to his welfare? If there is to be an automatic ban, there will be a need in certain circumstances for the court to have power to lift the ban in the interests of the child.[258] Such circumstances would include where the court orders the tracing of a ward or in child abduction cases to give publicity to the abduction.

(b) Ban on identifying adults

4.39 Banning the identification of children only would give special protection to the privacy of children. It may be argued that respect for the dignity and privacy of the adults involved in family proceedings means that adults too should not be named. A person may feel very undignified in the realisation that, for example, his neighbours

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[257] At para. 4.28

[258] As is the case with the provisions currently applying to certain proceedings in the magistrates' courts: see s. 97(4) of the Children Act 1989, and para. 2.52 above.

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know that his marriage was annulled on the ground of his inability to have sexual intercourse. The law already provides on occasion for adults to be given anonymity in order to encourage them to use the legal process, for example the victims of certain sexual offences.

4.40 The question of children not directly concerned in proceedings but affected by them has been discussed above, but one way to prevent the harm to a child that may be caused by publication of details of his parents' divorce proceedings would be to prevent the identification of the parents. If the parties had been permitted or had been able to settle their dispute otherwise than through litigation, it is likely that the law of confidence would have prevented them being named. It can therefore be argued that the mere fact that the court is the venue for the dispute resolution, or that the persons are obliged to submit the arrangements they have made to scrutiny by a court, should not affect the protection which the law would otherwise give to their private life.

4.41 If a ban on identifying adults were to be adopted, similar questions need to be addressed as for any ban on identifying children. Would the ban extend only to witnesses and parties, or should other adults whose conduct is relevant to the proceedings also be protected from identification? If the ban were to be automatic, should there be a power to lift the ban? It would appear somewhat paternalistic to lift the ban in the interests of an adult, but where all adults agreed and no child could be affected by publicity, there would seem to be no reason for objecting to them being named.

4.42 One further matter merits consideration in relation to this question. It is common for newspapers to report the fact of a couple's divorce, usually with a simple and brief statement that a decree absolute was issued to Mr and Mrs Smith after two years' separation, for instance. Should there be an exception in relation to publication of the fact that a marriage has been dissolved? Such an exception would be justified on the basis that marriage is a status which demands some publicity prior to its creation, and so perhaps there ought to be some publicity as regards the termination

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of this status. It is arguable whether the exception should also enable the report to name the couple and give the 'fact' which was relied upon as proof of the marriage having irretrievably broken down.

(c) Court directions on identification

4.43 This last issue relates to the instances where there is a ban on identifying a person and there are doubts about what may lawfully be reported. In order to allow reporters to print as much as possible without fear of prosecution, it is suggested that the court should be able to clarify this situation. The method would be for the court hearing the case to make an order or issue a direction to the effect that certain particulars would lead to a likelihood of a person being identified and therefore should not be published. It needs, however, to be borne in mind that such an arrangement might be less easy to administer in the particular circumstances of magistrates' courts than in courts presided over by a judge.

4.44 The need for such a power arises mainly out of the dangers of what is known as jigsaw identification. In most cases where an individual is not to be identified, it is fairly clear to the press exactly which details may be published and which are banned. However, in some cases, publication of certain details would mean that readers could deduce the identity of the person not to be identified. The risk of deduction may be greater where two newspapers cover the story but report different sets of facts. One newspaper may publish one set of facts, such that identification is not possible from the details it alone publishes. However, a person may read a second newspaper containing a slightly different set of facts. Again, the details in the second paper would not enable identification by themselves. But it is perfectly possible that the reader will be able to fit together the pieces of the jigsaw of information and deduce the identity.

4.45 In most cases, there is little risk of the ban on identification being weakened in this way. However, the risk is far greater in, say, a prosecution for child abuse. The court may order the press not to identify the abused child. It is very likely

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that the local press will want to give the name of the accused, whereas any coverage in the national newspapers will tend to involve the nature of the offence, i.e. that a parent has abused his or her child. Someone reading both will have discovered the identity of the child, but with little danger of either newspaper having committed an offence for breaching the ban.

4.46 The suggested need for the court to have the power to ban particular details can be seen from the recent case of ex parte Godwin.[259] As Glidewell L.J. observed,[260] where there is a potential problem as to identification, the judge may discuss the matter with the press and give advice about the publication of particular details. According to his Lordship, the press invariably respects such advice, though they are free to ignore it. The suggested power would mean that this advice would become a legally enforceable direction. The direction would be conclusive proof that the particulars in question would lead to the identification of the person concerned. Therefore, any publication in breach of the direction would constitute a breach of the ban on identification, making the publisher liable to the same penalties as if he had named the person. As with other orders made by the courts affecting the ability of the press to report family cases, it is envisaged that an appeals structure would be available to challenge these directions, as well as bans on identification where imposed by the courts in their discretion.

(2) Reporting of details of proceedings

4.47 The other aspect of any new reporting regime is the extent to which the particulars of proceedings may be reported. The question of identification, which has been discussed separately above, has a bearing on the range of details that are permitted to be published. This inter-relationship is discussed in greater detail in the following paragraphs.

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[259] Ex parte Godwin and others [1992] 1 Q.B. 190.

[260] *Ibid.*, at pp. 196-197.

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(d) Restrictions where proceedings are heard in private

4.48 Where a court hearing certain proceedings sits in private, there is at present a ban on the publication of any information relating to those proceedings. The only exception is that the order of the court may be published, although the court can in certain cases expressly prohibit its publication. The court can grant permission for all or some of the details to be published, and of course may decide to deliver judgment in open court. The prohibition takes effect by means of the law of contempt of court, and extends to any disclosure, even by the parties themselves, to persons who are not parties.[261]

4.49 One option would be to have a similar provision applying to all family proceedings heard in private. Having private hearings is justified partly on the ground of the persons' claim to privacy. Preventing the publication of the details that emerge at the private hearing would further protect this claim to privacy. It might be odd to insist on a private hearing only to allow all the details to be published, either contemporaneously or after the proceedings have ended.

4.50 This option would involve a prohibition on publication of any information relating to proceedings heard in private, except where the court granted leave to publish. There could perhaps be a provision setting out the grounds on which leave might be given. There would be an exception allowing publication of the order of the court, but the court would have power in all types of proceedings to prohibit this, again perhaps on grounds set out. At present, it is not clear in which proceedings, other than wardship, the court has the power to ban publication of the order. It is questionable whether it is necessary to subject the parties themselves to the risk of possible prosecution: perhaps the law could impose on them a duty of confidence, with only the media bound by any criminal prohibitions.[262] It would therefore always be possible for the press to apply for permission to report the judgment of a case, though

[261] See paras. 2.31 onwards for fuller details.

[262] See para. 4.56 below for further discussion.

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the court may consider it necessary to anonymize the judgment.

(b) Restriction on details

4.51 One further matter relating to the reporting of family proceedings remains to be considered. This is whether there ought to be some restriction on the particulars that can be reported, where reporting is possible. Reporting would be possible where the court sat in public, or where the court delivered judgment in open court, or where permission for the reporting of the judgment of a court sitting in private had been given.[263] Three options are possible: first, there could be no restriction on the particulars to be reported; secondly, there could be automatic restrictions prescribed by legislation; and thirdly, the position might be that no limitation would apply unless the court ordered that a set of restrictions should apply to the reporting of a particular case.

4.52 In proceedings for divorce, nullity, and judicial separation, and in family proceedings in a magistrates' court, the press may only publish certain particulars, usually a brief description of the factual allegations, any submissions on points of law, and the decision of the court. The restrictions apply to all such cases without the need for a court to impose them.[264] This type of restriction allows the important issues that are raised by the case to be discussed, without exposing the entirety of the private lives of the litigants to public view. It recognises that, merely because a case in which a person is involved raises a matter of public interest, the person has not forfeited any claim to privacy.

4.53 The relationship between restricting the details that may be disclosed and banning the identification of adults is relevant here. It may be argued that there are

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[263] Reporting would also be possible where the media had lawfully obtained access to court documents. Any changes to the rules concerning access to court documents would have consequences not just for the reporting of family proceedings, but also for the conduct of all types of proceedings. The question of access to court documents falls outside our terms of reference.

[264] See paras. 2.21 to 2.23 and 2.51 above.

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two alternative methods of providing some respect for people's private lives where a case is to be reported. The law may either allow the persons to be identified, in which case respect for their privacy would demand some limits on the details to be reported; or the law may prohibit identification, in which case there might be less or no need to limit the details to be published. We would be interested to find out whether respondents consider this to be a valid approach and, if so, which of the two alternatives is preferable; or whether it is considered that there are circumstances in which there may be a need, in the interests of a person's privacy, to prevent identification and limit the particulars to be published. If this is the case, could such a danger be met by the court having a discretion to limit reporting to certain particulars set out in legislation? Or would the court need the power to prohibit reporting of all details, save for a certain minimum amount of information which could always be published?

4.54 Views would also be welcome as to whether, if limitations on details were to be imposed, the current type of limitation as found in the 1926 and 1980 Acts is acceptable, or whether the press should be permitted to publish a wider or narrower range of details. This point is linked to the discussion above of the scope of any discretionary power to limit the details that may be reported. In support of allowing a wider range of details to be published, it might be argued that there might be cases, for instance those involving allegations of satanic abuse, where the issues did not concern points of law but the facts themselves and people's reactions to the allegations.

Reporting of appeal hearings

4.55 There would seem to be two possible approaches as regards the reporting of appeals. First, the position as regards reporting that applied at first instance could also apply on appeal. Secondly, there could be a separate, and perhaps less restrictive, set of provisions relating to the reporting of appeals. The second approach would recognise that issues of public importance are far more likely to be at stake in the appellate courts than in most courts of original jurisdiction. It may

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be that the media should always be able to report the judgment of an appeal court, provided that anonymity could be maintained where the court considered it appropriate.

Sanctions

4.56 This section deals with possible sanctions that might be available under any new law for breach of reporting restrictions. The matters discussed include whether the sanctions should be based on the civil or criminal law, whether the individuals concerned should have any remedy for the breach of reporting restrictions, and the extent of any restrictions. There is also an examination of the persons bound by any restrictions and whether different rules should apply to different types of report.

The criminal law

4.57 At present, the criminal law is effectively the only method for enforcing reporting restrictions.[265] The offences under the Magistrates' Courts Act 1980 and the Children Act 1989 allow for fines only, and are triable only summarily. The offence under the 1926 Act allows for the imposition of a fine and imprisonment, and the same is true of the court's powers on finding a person guilty of contempt.

4.58 There is, however, no provision for trial by jury. Two points arise for consideration: first, whether there should be any provision for a sentence of imprisonment for breach of reporting restrictions; second, whether there should be a right to trial by jury for such offences.

4.59 The criminal sanctions which apply at present operate in different ways, some being statutory offences while others are based in the law of contempt. This difference is compounded by the different extent of the various restrictions: in some cases the parties themselves are bound by the restrictions; in some, law reporters are

[265] But see para 2.117 on a possible civil law action.

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exempt from the restrictions, but not in others; in some, the restrictions apply to newspapers and television, but in others only to newspapers; and the different restrictions sometimes apply to professional journals and sometimes not.

4.60 There is a powerful case for rationalisation of the extent of the prohibitions. Rationalisation would best be served by having one single statutory offence, with the extent of the offence clearly set out. This might involve the removal of the law of contempt from this area of the law. Presumably the restrictions would apply to all newspapers, periodicals, and broadcast media. There may be a need to extend the scope of the restrictions to other written publications, such as books.

4.61 This would also provide an opportunity to rationalise the mechanics of enforcement. Relying exclusively on the criminal law would make enforcement action dependent on police investigation which might be both cumbersome and an unwelcome burden on police resources. There might be a case for a simplified enforcement procedure whereby the court whose proceedings appeared to have been reported in breach of the relevant statutory restriction could issue a summons requiring the editor to show cause why the newspaper should not be subject to a financial penalty. The question also arises whether, if it is concluded that a statutory offence should be the principal sanction, the consent of the Attorney General should remain a prerequisite to prosecution, or whether it might be sufficient simply to require the consent of the Director of Public Prosecutions.

4.62 Rationalisation would also enable clarification of the extent to which restrictions apply to law reports. It might be that law reports would be exempt from any restrictions which related to the details that could be published, but that law reports should be bound by any ban on identification to the same extent as any other publication. It would further help those responsible for the publication of law reports to provide a definition of a law report for the purpose of such restrictions. A law report might suitably be defined as a report of a case which is capable of citation in court. Until recently, this meant that the report had to be by a barrister who was present

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when judgment was given.[266] Now, however, the reporter need not be a barrister but may be a solicitor or a person who has a right of audience in relation to all proceedings in the Supreme Court.[267]

4.63 The question also arises as to whether the parties themselves should be subject to criminal prohibitions on disclosing the confidences of the courtroom. They are so subject at present where the offence is in the nature of a contempt of court. It may seem over-restrictive to prohibit the parties from discussing any aspect of the case, even with a friend, at the risk of a fine or imprisonment. One justification for such a wide-ranging restriction might be to discourage the media from attempting to elicit information from parties about the proceedings. However, this purpose could be served with the same efficacy by imposing a duty of confidence on the parties, rather than exposing them to the risk of criminal prosecution. The duty of confidence could be enforced by civil action by any of the other parties, and the duty would extend to any person who received the information and who knew it was confidential, regardless of whether or not they were also bound by any criminal offence.

Enforcement by individuals?

4.64 Some, but not all, of the arguments in favour of restrictions are based on the claims of individuals in the court process. Should the law meet these claims by allowing the individuals to sue for breach of the restrictions? Private individuals may be involved in one of three ways: first, the law could allow private prosecutions for breach of any criminal prohibitions; second, there could be provision for private individuals to sue for an injunction to prevent the breach of the restrictions, and possibly sue for an account for profits; third, the law may recognise a right to sue for damages for breach of the restrictions. Traditionally the law has not recognised any head of damages for injury to feelings, so allowing persons to sue for damages here would be a departure from this general position. Such damages would be very difficult

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[266] See Birtwistle v. Tweedale [1954] 1 W.L.R. 190n.

[267] By virtue of the Courts and Legal Services Act 1990, s.115.

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to quantify, and there would be the same dilemma as in libel law between over-compensation for the individual and too low an award to provide an effective deterrent against future breaches: if damages were to be an available remedy, it might perhaps be better to have damages assessed by a judge.

4.65 Private prosecutions were not possible for breach of any of the statutory reporting restrictions until the 1989 Act. That Act provides the only exception to the need for the Attorney-General's consent. Where the offence is a contempt, it would seem that the offended party to the proceedings may apply for an order of committal, but leave is required for the bringing of the application, thus serving as a filter against undeserving or trivial contempts. To allow private prosecutions in general would thus leave the press at greater risk of prosecution than at present.

4.66 With respect to injunctions, if one purpose of restrictions is to protect the privacy and dignity of the individuals whose lives are subject to the outcome of the proceedings, one of the most effective ways to protect this privacy is to prevent publication of the details which would offend this dignity and privacy. The distress is caused by publication of the details; the most effective way to stop the distress is to stop the publication. The position at the moment is unclear, but it would appear that individuals cannot sue for an injunction on the basis that the publication would be an offence under one of the 1926, 1980 and 1989 Acts. Under a new scheme, it would be possible for the injunction to be available against a wider range of persons than simply the media; it may be that the criminal offences would not apply to individuals but that any new civil remedy would lie against them.

Challenges

4.67 The current position at English law is that there is no right of appeal against an order made in pursuance of a discretionary power which has the effect of restricting access to or reporting of family proceedings (e.g. under section 39(1) of the Children and Young Persons Act 1933). Where such a discretionary power is exercised in a magistrates' or county court, the person aggrieved may apply for judicial

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review to challenge the decision. But where that discretion is exercised in the High Court, judicial review is not available and it would appear that no other form of challenge exists.

4.68 Options 2, 4 and possibly 3 above would afford the courts considerable discretion to allow or restrict access to and reporting of family proceedings. No doubt they would normally exercise that discretion properly and appropriately. However, notwithstanding the provision of a checklist, it would not always be an easy discretion to exercise and there is some risk that inconsistent decisions could occur in different proceedings at different levels in different courts, especially until the courts became experienced in applying the new legislation. For these reasons we believe that it should be possible for decisions made in the exercise of this discretion to be challenged, in particular by the parties and the media. This view is strengthened by our examination of the European Convention on Human Rights (see Annex C) from which we conclude that Article 13 requires the availability of an effective challenge against the exercise of such discretionary powers.

4.69 We envisage a provision on the lines of that in section 159 of the Criminal Justice Act 1988, which was introduced following consideration by the European Commission of Human Rights of the position in criminal proceedings.[268] Under section 159 a person aggrieved can appeal to the Court of Appeal, with that court's leave, against an order made in the Crown Court in relation to a trial on indictment:-

(a) under section 4 or 11 of the Contempt of Court Act 1981 (section 4 allows the court to order the postponement of publication of reports of proceedings where necessary for avoiding a substantial risk of prejudice to the present or imminent proceedings, and section 11 empowers a court to give directions prohibiting the publication of a name or other matter in connection with the proceedings where this has been withheld

[268] Hodgson and Others v. U.K., (1987) 10 E.H.R.R. 503.

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from the public during the proceedings);

(b) restricting the access of the public to all or part of the proceedings; and

(c) restricting the publication of a report of all or part of the proceedings.

4.70 We suggest that in family proceedings there should be a similar right of appeal to the Court of Appeal (Civil Division) from the High Court or a county court, or to the Divisional Court from a magistrates' court. Rules of Court provide under section 159 for a rapid system of appeal so as not to delay the main proceedings unduly. Provision for a similarly expeditious system of appeal would be needed in cases relating to family proceedings.

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PART V

SUMMARY AND CONSULTATION POINTS

5.1 In this final Part of the paper we summarise our current proposals (***In bold italics***) and raise a number of questions which seem to us to be relevant to potential reform of this complex area. At each question we refer, where appropriate, to the paragraphs in the paper where the relevant discussion appears. The list of questions is not, however, intended to be exhaustive and any other views which respondents might have would be warmly welcomed.

PART I – INTRODUCTION

5.2 As part of its rolling programme of reform of family law and procedure, the Government is reviewing questions about access to courts which are conducting family proceedings and about the reporting by the media of those proceedings. At present the statutory provisions covering these questions are scattered through a range of Acts of Parliament and rules of court, with provisions which vary considerably according to the type of case and the type of court in which they are considered. In addition, the practice of the courts is not always obvious from the legislation. These inconsistencies have been emphasised by the implementation in late 1991 of a concurrent jurisdiction under the Children Act 1989. This provides for the transfer of proceedings between the magistrates' courts, the county courts and the High Court. It therefore highlights the differences between the provisions applying to the different levels of court, and points up the desirability of having consistent legislation and practice governing access to and reporting of all family proceedings.

5.3 Attention has been drawn from time to time to the inconsistency of the law in this area: the Finer (1974), Booth (1985), Butler-Sloss (1988) and Calcutt Reports (1990 and 1993) all recommended changes in the law.

(i) *Should there be simplification and codification of the statutory*

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provisions about access to and reporting of family proceedings so as to avoid complexity, inconsistency and practical difficulties?

(ii) *If so, would this be done better by providing a single code embodied in a single piece of legislation, or by each new Bill which covers family law having its own provisions, according to a standard set of general principles?*

PART II – THE CURRENT LAW

5.4 The general rule at English common law is that all courts should sit in public. There are, however, common law exceptions to this rule (e.g. wardship cases are generally heard in private); and in addition, many different statutes and rules of court have authorised courts to sit in private when hearing family proceedings (e.g. all ancillary relief and children's cases in the High Court and county courts). It is sometimes difficult for the lay person to anticipate from the legislation whether proceedings will be in public or in private.

5.5 As regards reporting, in the absence of any specific rule of law the media are at liberty to publish whatever they choose about legal proceedings; but again, legislation has placed restrictions on reporting in family cases (e.g. section 1(1)(b) of the Judicial Proceedings (Regulation of Reports) Act 1926 under which only certain details relating to judicial proceedings for divorce, nullity or judicial separation may be printed or published). Furthermore, given that many cases are heard in private, this effectively acts as a restriction on reporting.

5.6 There is, however, not only variation in the current law as between different types of proceedings but also in respect of the same type of proceedings across different tiers of court. This is demonstrated by the tables at Annex B which also set out figures indicating the volume of the different types of proceeding under consideration. Thus, the press may always attend domestic violence cases heard in the magistrates' courts under the Domestic Proceedings and Magistrates' Courts Act

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1978, whereas in equivalent proceedings in the High Court or county courts the hearing will be in chambers and the press will therefore be excluded.

5.7 Similarly, the reporting provisions of section 97(2) of the Children Act 1989 apply only to magistrates' courts; proceedings in the county courts continue to rely on the general provisions under the Children and Young Persons Act 1933 and the Administration of Justice Act 1960. While there is, therefore, a mandatory prohibition on the publication of information identifying a child involved in a magistrates' court, in a county court any such prohibition will be at the court's discretion. This is anomalous and may cause problems where a case which is started in a magistrates' court is later transferred to a county court under the Children Act's provisions for the allocation of proceedings.

(iii) *Is the current law operating satisfactorily?*

(iv) *How easy is it to ascertain the current practice by studying the legislation?*

PART III – THE ARGUMENTS

5.8 Arguments for and against open access to family proceedings, and for and against unrestricted reporting of family proceedings are set out in Part III of this report.

(v) *Are <u>all</u> the arguments set out in Part III?*

(vi) *Is the current balance between openness and privacy generally appropriate?*

(vii) *Where should the balance between open justice and privacy lie in any new access and reporting regime?*

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(viii) *Should children be afforded a special degree of protection from publicity?*

PART IV – OPTIONS FOR CHANGE

5.9 The existing law and practice is highly complex and many inconsistencies have arisen by virtue of its piecemeal development. ***We believe there is a need for rationalisation of the law and practice relating to access to and reporting of family proceedings to remove unnecessary complexity and inconsistency and to establish provisions which are as clear and simple as possible while retaining flexibility where necessary. However, the current balance between openness and privacy seems to be generally accepted, and therefore we do not consider there is a need for change for its own sake.***

Access

5.10 We consider that there are five major options:

(1) no access;
(2) private proceedings but with power to allow access;
(3) restricted access;
(4) public proceedings but with power to restrict access; and
(5) unrestricted access.

Of these, we do not believe that option 1 or 5 would be acceptable. ***Options 2, 3 and possibly 4 provide the best opportunities for reform. Whichever option is chosen, the legislation should make it clear what the normal practice of the courts would be.*** In addition, there should be statutory principles or guidelines to direct the exercise of the power to displace the presumption in options 2 and 4 (and possibly 3). ***The following is a possible list of factors (i.e. a checklist) to which a court should have regard when considering whether the general presumption should be overridden in a particular case:–***

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(a) the nature of the proceedings;

(b) the person seeking access and his reason for seeking access;

(c) the welfare of any child concerned in or affected by the proceedings;

(d) the wishes of the parties to the proceedings; and

(e) whether or not the proceedings raise a matter of public interest.

5.11 ***Committal proceedings should normally be held in open court, but with the possibility of imposing reporting restrictions, although there are arguments in favour of private hearings when children are involved or affected.***

5.12 We believe ***there are two principal options for dealing with access to cases heard on appeal:*** under the first, appeals could be heard in private if the court at first instance had power to sit in private (i.e. the current position); and the second would involve the introduction of a separate regime for access to appeal cases whereby all cases (with perhaps just a very few exceptions) would be heard in open court. Concerns for privacy could be met through restrictions on reporting.

(ix) *Does the consultation paper identify the main options for change as regards access? (paras. 4.6 – 4.20). If not, what other options are there?*

(x) *Please comment on the options – with particular reference to any anticipated practical difficulties – indicating which (if any) is to be preferred, and why.*

(xi) *Should there be statutory principles or guidelines to direct the exercise of a discretionary power to displace a presumption of private or public proceedings? (paras. 4.7 and 4.21 – 4.28)*

(xii) *Please comment on the checklist. Are there any additional factors which should be included? (para. 4.28)*

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(xiii) *Should committal hearings in family proceedings ever be heard in private? If so, in what circumstances? (paras. 4.29 – 4.30)*

(xiv) *Two options are set out for dealing with access to appeal hearings. Which is preferable, and why? (paras. 4.31 – 4.32) Should any other options be considered?*

Reporting

5.13 The position as regards reporting of family proceedings is, if anything, yet more complex than that relating to access. Again, there are different statutory provisions according to the type of case and level of court. There is widespread inconsistency, not only as to what details may be reported and those who are bound by the restrictions, but also as to the consequences when the restrictions are not observed. As with access, we believe ***there is a powerful case for rationalisation of reporting restrictions.***

5.14 ***It is also our preliminary view that there should be an automatic ban on identifying children who are involved in or affected by proceedings, subject to a power to lift that ban where the interests of the child require it e.g. in child abduction cases.***

5.15 ***As regards reporting of appeals, there again seem to be two main options:*** first, that the provisions which apply to reporting at first instance should apply on appeal; and second, that there should be a separate, less restrictive regime which would have regard to the issues of public importance which may be raised on appeal.

(xv) *Are reporting restrictions in need of rationalisation?*

(xvi) *Should there be a ban on the identification of children or adults (or both), and should this extend only to parties, witnesses and those who are the subject of the proceedings, or should it encompass anyone*

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who is affected by the proceedings? (paras. 4.35 – 4.46)

(xvii) *If there is a ban on identification, should it be automatic or discretionary? (paras. 4.35 – 4.38 and 4.41)*

(xviii) *Should special protection be afforded to the privacy of children? (paras. 4.37 – 4.38)*

(xix) *If there is a ban on identification, should it apply to all reports of proceedings (i.e. to all newspapers, broadcast media, journals, law reports etc.)?*

(xx) *If there is a ban on identification, should there be any exceptions to it e.g. proceedings for the dissolution of marriage (see para 4.42)?*

(xxi) *Should there be a legally enforceable overriding power for the court to give directions as to what may be published e.g. where there is a danger of jigsaw identification? (paras. 4.43 – 4.46)*

(xxii) *What restrictions, if any, should there be on publication of information relating to proceedings heard in private? (paras. 4.48 – 4.50)*

(xxiii) *Where a case is to be reported, is it preferable for respect for a person's private life to be guaranteed either:*

- *by banning identification but otherwise allowing any details to be published; or*
- *by allowing identification but limiting the details to be published? (para. 4.53)*

(xxiv) *Are there any circumstances where it may be necessary in order to preserve a person's privacy both to ban identification and to limit the*

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details to be published? If so, could such a need be met by a general prohibition in legislation or is a discretionary power required? (para. 4.53)

(xxv) *If a limitation on publication of details is to be imposed, is the range of details currently allowed by the 1926 and 1980 Acts acceptable? (para. 4.54)*

(xxvi) *Two options are set out for dealing with reporting of cases heard on appeal. Which is preferable and why? Should any other options be considered? (para. 4.55)*

Sanctions

5.16 The sanctions which currently apply for breach of reporting restrictions have their basis either in specific statutory criminal offences or in the law of contempt. There are inconsistencies as to the range of those bound by the restrictions and as to who may enforce them.

5.17 As with access and reporting, we suggest that ***the sanctions available for enforcing reporting restrictions should be rationalised.*** There might be a single statutory offence, with the law of contempt being removed from this area of the law. The restrictions could apply to all the media. Law reporters would be exempt but would perhaps be bound by any restrictions that prohibited the identification of any person. There might also be a duty of confidence imposed on the parties, enforceable by civil action by any of the other parties; the duty would extend to members of the media who received information from parties.

(xxvii) *What rationalisation of sanctions should there be? (paras. 4.56 – 4.66)*

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Challenges

5.18 There is currently no right of appeal against an order made in pursuance of a discretionary power (e.g. under section 39(1) of the Children and Young Persons Act 1933). Judicial review is available to challenge such an order made in a magistrates' or county court, but not in respect of an order made in the High Court.

5.19 If either of options 2 and 4 (or possibly 3) (para. 5.10 above) were to be adopted, it would be necessary for the court to exercise a discretion to allow or restrict access. We believe that in accordance with Article 13 of the European Convention on Human Rights (which requires the availability of an effective challenge to the exercise of such discretionary powers) it should be possible for the parties and the media to challenge the exercise of that discretion, as it is under section 159 of the Criminal Justice Act 1988 in relation to criminal trials on indictment. ***We therefore propose that there should be a right of appeal to the Court of Appeal (Civil Division) from the High Court and county courts, and to the Divisional Court from magistrates' courts, against orders allowing or restricting access to or reporting of family proceedings.***

(xxviii) *Should there be a mechanism, and if so of what kind, for challenging a court's exercise of its discretion regarding access or reporting? (paras. 4.67 – 4.70).*

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ANNEX A

THE CURRENT LEGISLATION

1. The Judicial Proceedings (Regulation of Reports) Act 1926

1(1) It shall not be lawful to print or publish, or cause or procure to be printed or published--

(a) in relation to any judicial proceedings any indecent matter or indecent medical, surgical or physiological details being matters or details the publication of which would be calculated to injure public morals;

(b) in relation to any judicial proceedings for dissolution of marriage, for nullity of marriage, or for judicial separation, any particulars other than the following, that is to say:

(i) the names, addresses and occupations of the parties and witnesses;

(ii) a concise statement of the charges, defences and counter-charges in support of which evidence has been given;

(iii) submissions on any point of law arising in the course of the proceedings, and the decision of the court thereon;

(iv) the summing-up of the judge and the finding of the jury (if any) and the judgment of the court and observations made by the judge in giving judgment:

Provided that nothing in this part of this subsection shall be held to permit the publication of anything contrary to the provisions of paragraph (a) of this subsection.

(2) If any person acts in contravention of the provisions of this Act, he shall in respect of each offence be liable, on summary conviction, to imprisonment for a term not exceeding four months, or to a fine not exceeding level 5 on the standard scale, or to both such imprisonment and fine:

Provided that no person, other than a proprietor, editor, master printer or publisher, shall be liable to be convicted under this Act.

(3) No prosecution for an offence under this Act shall be commenced in England and Wales by any person without the sanction of the Attorney-General.

(4) Nothing in this section shall apply to the printing of any pleading, transcript or evidence or other document for use in connection with any judicial proceedings or the communication thereof to persons concerned in the proceedings, or to the printing or publishing of any notice or report in pursuance of the directions of the court; or to the

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printing or publishing of any matter in any separate volume or part of any bona fide series of law reports which does not form part of any other publication and consists solely of reports of proceedings in courts of law, or in any publication of a technical character bona fide intended for circulation among members of the legal or medical professions.

...

2. The Children and Young Persons Act 1933

39(1) In relation to any proceedings in any court, the court may direct that--

(a) no newspaper report of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of any child or young person concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings are taken, or as being a witness therein;

(b) no picture shall be published in any newspaper as being or including a picture of any child or young person so concerned in the proceedings as aforesaid;

except in so far (if at all) as may be permitted by the direction of the court.

(2) Any person who publishes any matter in contravention of any such direction shall on summary conviction be liable in respect of each offence to a fine not exceeding level 5 on the standard scale.

N.B. The Broadcasting Act 1990, Schedule 20, paragraph 3 extends the 1933 Act:-

3(2) Sections 39 and 49 (restriction on newspaper reports of court proceedings involving children and young persons) shall, with the necessary modifications, apply in relation to reports or matters included in a **programme service**, and in relation to including any such reports or matters in such a service, as they apply in relation to reports or matters published in newspapers and to publishing any matter in a newspaper.

Note:- a "programme service" covers nearly all the broadcast media, including radio, and tv, both terrestrial and satellite.
Note:- a child is defined as a person who has yet to attain the age of 14, and a young person as one who has attained the age of 14 and is under the age of 17.

3. The Administration of Justice Act 1960

12(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is

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to say:

(a) where the proceedings--

(i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;

(ii) are brought under the Children Act 1989; or

(iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor;

...

(e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.

(2) Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication.

(3) In this section references to a court include references to a judge and to a tribunal and to any person exercising the functions of a court, a judge or a tribunal; and references to a court sitting in private include references to a court sitting in camera or in chambers.

(4) Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section.

4. The Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968

1(1) Where an appeal is brought against a decision of any of the courts mentioned in subsection (4) below, or an application is made for leave to appeal against a decision of any of those courts, and that court had power to sit in private during the whole or any part of the proceedings in which the decision was given, then, subject to subsections (2) and (3) below, the court hearing the appeal or application shall have power to sit in private during the whole or any part of the proceedings on the appeal or application.

(2) Without prejudice to the next following subsection, the court hearing the appeal or application shall give its decision and the reason for its decision in public unless there are good and sufficient grounds for giving them in private and in that case the court shall state those grounds in public.

(3) Where the decision of any of the courts mentioned in subsection (4) below against which an appeal is brought--

(a) is a conviction, or a sentence or other order made on conviction, or

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(b) was given in the exercise of jurisdiction to punish for contempt of court,

the court hearing the appeal or any further appeal arising out of the same proceedings shall, notwithstanding that it sat in private during the whole or any part of the proceedings on the appeal state in open court the order made by it on the appeal.

(4) The courts referred to in subsections (1) and (3) above are the Court of Appeal, the High Court, the Crown Court, the Restrictive Practices Court, a county court and a magistrates' court.

(5) An application to a court to sit in private during the whole or any part of the proceedings on such an appeal or application as is mentioned in subsection (1) above shall be heard in private unless the court otherwise directs.

(6) The powers conferred on a court by this section shall be in addition to any other power of the court to sit in private.

(7) In this section references to a power to sit in private are references to a power to sit in camera or in chambers, but the power conferred by this section on a court which has no power to sit in chambers is a power to sit in camera only.

(8) In this section "appeal" includes appeal by case stated, and references to a court include references to a judge exercising the powers of a court.

2(1) The following provisions of this section shall have effect with a view to preventing or restricting publicity for--

(b) proceedings under section 22 of that Act[269] (which relates to proceedings by a wife against her husband for maintenance), including any proceedings begun before the said commencement and carried on under that section and any proceedings for the discharge or variation of an order made or deemed to have been made under that section or for the temporary suspension of any provision of any such order or the revival of the operation of any provision so suspended;

(c) proceedings under section 27 of the Matrimonial Causes Act 1973 (which relates to proceedings by a wife against her husband, or by a husband against his wife, for financial provision) and any proceedings for the discharge or variation of an order made under that section or for the temporary suspension of any provision of any such order or the revival of the operation of any provision so suspended;

(d) proceedings under Part III of the Family Law Act 1986; and

(e) proceedings under section 56(1) of the Family Law Act 1986

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[269] It may be that this paragraph should have been repealed at some stage. It initially referred to section 22 of the Matrimonial Causes Act 1965. This section enabled courts to order maintenance payments between spouses. The power is now in section 27 of the Matrimonial Causes Act 1973, referred to in paragraph (c).

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(declarations of parentage).[270]

(3) Section 1(1)(b) of the Judicial Proceedings (Regulation of Reports) Act 1926 (which restricts the reporting of matrimonial causes) shall extend to any such proceedings as are mentioned in subsection (1) above subject, in the case of proceedings mentioned in subsection (1)(d) or (e) above, to the modification that the matters allowed to be printed or published by virtue of sub-paragraph (ii) of the said section 1(1)(b) shall be particulars of the declaration sought by a petition (instead of a concise statement of the charges, defences and counter-charges in support of which evidence has been given).

...

5. The Matrimonial Causes Act 1973

48(2) In any proceedings for nullity of marriage, evidence on the question of sexual capacity shall be heard in camera unless in any case the judge is satisfied that in the interests of justice any such evidence ought to be heard in open court.

6. The Adoption Act 1976

64 Proceedings under this Act--

(a) in the High Court, may be disposed of in chambers;
(b) in a county court, shall be heard and determined in camera.

7. The Magistrates' Courts Act 1980

65(1) In this Act "family proceedings" means proceedings under any of the following enactments, that is to say--

(a) the Maintenance Orders (Facilities for Enforcement) Act 1920;
(b) section 43 of the National Assistance Act 1948;
(c) section 3 of the Marriage Act 1949;
(ee) section 35 of the Matrimonial Causes Act 1973;
(f) Part I of the Maintenance Orders (Reciprocal Enforcement) Act 1972;
(h) the Adoption Act 1976, except proceedings under section 34 of that Act;[271]
(i) section 18 of the Supplementary Benefits Act 1976;[272]

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[270] This paragraph was added by Sched. 2, para. 19 of the Family Law Reform Act 1987. The 1987 Act substituted a new s.56 in the 1986 Act. It should be noted that proceedings under s.56(1) will be covered by paragraph (d) in any event.

[271] Section 34 of the Adoption Act 1976 was repealed by the Children Act 1989, Sched. 15.

[272] This section was repealed by the Social Security Act 1986, Sched. 11.

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(j) Part I of the Domestic Proceedings and Magistrates' Courts Act 1978;
(l) section 60 of this Act;
(m) Part I of the Civil Jurisdiction and Judgments Act 1982, so far as that Part relates to the recognition or enforcement of maintenance orders;
[(m) section 24 or 25 of the Social Security Act 1986;][273]
(n) section 106 of the Social Security Administration Act 1992; and
(o) the Children Act 1989,

except that, subject to subsection (2) below, it does not include--

(i) proceedings for the enforcement of any order made, confirmed or registered under any of those enactments;
(ii) proceedings for the variation of any provision for the periodical payment of money contained in an order made, confirmed or registered under any of those enactments; or
(iii) proceedings on an information in respect of the commission of an offence under any of those enactments.

(2) The court before which there fall to be heard any of the following proceedings, that is to say--

(a) proceedings (whether under this Act or any other enactment) for the enforcement of any order made, confirmed or registered under any of the enactments specified in paragraphs (a) to (k), (m) and (n) of subsection (1) above;
(b) proceedings (whether under this Act or any other enactment) for the variation of any provision for the making of periodical payments contained in an order made, confirmed or registered under any of those enactments;
(c) proceedings for an attachment of earnings order to secure maintenance payments within the meaning of the Attachment of Earnings Act 1971 or for the discharge or variation of such an order; or
(d) proceedings for the enforcement of a maintenance order which is registered in a magistrates' court under Part II of the Maintenance Orders Act 1950 or Part I of the Maintenance Orders Act 1958 or for the variation of the rate of payments specified by such an order,

may if it thinks fit order that those proceedings and any other proceedings being heard therewith shall, notwithstanding anything in subsection (1) above, be treated as family proceedings for the purposes of this Act.

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[273] This paragraph, inserted by the Social Security Act 1986, Sched. 10, para. 54, was replaced by the following paragraph (n), inserted by the Social Security (Consequential Provisions) Act 1992, Sched. 2, para. 60.

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(3) Where the same parties are parties--

(a) to proceedings which are family proceedings by virtue of subsection (1) above, and
(b) to proceedings which the court has power to treat as family proceedings by virtue of subsection (2) above,

and the proceedings are heard together by a magistrates' court, the whole of those proceedings shall be treated as family proceedings for the purposes of this Act.

(4) No appeal shall lie from the making of, or refusal to make, an order under subsection (2) above.

...

69(1) The business of magistrates' courts shall, so far as is consistent with the due dispatch of business, be arranged in such manner as may be requisite for separating the hearing and determination of family proceedings from other business.

(2) In the case of family proceedings in a magistrates' court other than proceedings under the Adoption Act 1976, no person shall be present during the hearing and determination by the court of the proceedings except--

(a) officers of the court;
(b) parties to the case before the court, their legal representatives, witnesses and other persons directly concerned in the case;
(c) representatives of newspapers or news agencies;
(d) any other person whom the court may in its discretion permit to be present, so, however, that permission shall not be withheld from a person who appears to the court to have adequate grounds for attendance.

(3) In relation to any family proceedings under the Adoption Act 1976, subsection (2) above shall apply with the omission of paragraphs (c) and (d).

(4) When hearing family proceedings, a magistrates' court may, if it thinks it necessary in the interest of the administration of justice or of public decency, direct that any persons, not being officers of the court or parties to the case, the parties' legal representatives, or other persons directly concerned in the case, be excluded during the taking of any indecent evidence.

(5) The powers conferred on a magistrates' court by this section shall be in addition and without prejudice to any other powers of the court to hear proceedings in camera.

(6) Nothing in this section shall effect the exercise by a magistrates' court of the power to direct that witnesses shall be excluded until they are called for examination.

...

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71(1) In the case of family proceedings in a magistrates' court (other than proceedings under the Adoption Act 1976) it shall not be lawful for a person to whom this subsection applies--

(a) to print or publish, or cause or procure to be printed or published, in a newspaper or periodical, or
(b) to include, or cause or procure to be included, in a programme included in a programme service (within the meaning of the Broadcasting Act 1990) for reception in Great Britain,

any particulars of the proceedings other than such particulars as are mentioned in subsection (1A) below.

(1A) The particulars referred to in subsection (1) above are--

(a) the names, addresses and occupations of the parties and witnesses;
(b) the grounds of the application, and a concise statement of the charges, defences and counter-charges in support of which evidence has been given;
(c) submissions on any point of law arising in the course of the proceedings and the decision of the court on the submissions;
(d) the decision of the court, and any observations made by the court in giving it.

(1B) Subsection (1) above applies--

(a) in relation to paragraph (a) of that subsection, to the proprietor, editor or publisher of the newspaper or periodical, and
(b) in relation to paragraph (b) of that subsection, to any body corporate which provides the service in which the programme is included and to any person having functions in relation to the programme corresponding to those of an editor of a newspaper.

(2) In the case of family proceedings in a magistrates' court under the Adoption Act 1976, subsection (1A) above shall apply with the omission of paragraphs (a) and (b) and the reference in that subsection to the particulars of the proceedings shall, in relation to any child concerned in the proceedings, include--

(a) the name, address or school of the child,
(b) any picture as being, or including, a picture of the child, and
(c) any other particulars calculated to lead to the identification of the child.

(3) Any person acting in contravention of this section shall be liable on summary conviction to a fine not exceeding level 4 on the standard scale.

(4) No prosecution for an offence under this section shall be begun without the consent of the Attorney-General.

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(5) Nothing in this Act shall prohibit the printing or publishing of any matter in a newspaper or periodical of a technical character bona fide intended for circulation among members of the legal or medical professions.

...

8. The Supreme Court Act 1981

67 Business in the High Court shall be heard and disposed of in court except in so far as it may, under this or any other Act, under rules of court or in accordance with the practice of the court, be dealt with in chambers.

9. The County Courts Act 1984

76 In any case not expressly provided for by or in pursuance of this Act, the general principles of practice in the High Court may be adopted and applied to proceedings in a county court.

10. The Family Law Act 1986

N.B. This refers to Part III, the Part dealing with declarations of status and legitimacy.

60(4) The court hearing an application under this Part may direct that the whole or any part of the proceedings shall be heard in camera, and an application for a direction under this subsection shall be heard in camera unless the court otherwise directs.

11. The Children Act 1989

97(1) Rules made under section 144 of the Magistrates' Courts Act 1980 may make provision for a magistrates' court to sit in private in proceedings in which any powers under this Act may be exercised by the court with respect to any child.

(2) No person shall publish any material which is intended, or likely, to identify--

(a) any child as being involved in any proceedings before a magistrates' court in which any power under this Act may be exercised by the court with respect to that or any other child; or

(b) an address or school as being that of a child involved in any such proceedings.

(3) In any proceedings for an offence under this section it shall be a defence for the accused to prove that he did not know, and had no reason to suspect, that the published material was intended, or likely, to identify the child.

(4) The court or the Lord Chancellor may, if satisfied that the welfare of the child requires it, by order dispense with the requirements of subsection (2) to such extent

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as may be specified in the order.

(5) For the purposes of this section--

"publish" includes--

(a) include in a programme service (within the meaning of the Broadcasting Act 1990); or
(b) cause to be published; and

"material" includes any picture or representation.

(6) Any person who contravenes this section shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale.

(7) Subsection (1) is without prejudice to--

(a) the generality of the rule making power in section 144 of the Act of 1980; or
(b) any other power of a magistrates' court to sit in private.

(8) Sections 69 (sittings of magistrates' courts for family proceedings) and 71 (newspaper reports of certain proceedings) of the Act of 1980 shall apply in relation to any proceedings to which this section applies subject to the provisions of this section.

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ANNEX B

TABLES

1. This annex consists of three tables. The first makes use of relevant judicial statistics to give an indication of the volume of each type of proceedings. The other two respectively set out the position as regards access to, and reporting of, the individual types of family proceedings.

2. The figures in the table on judicial statistics are from 1989. The figures for the High Court and county courts are taken from Judicial Statistics, Annual Report 1989.[274] The figures for magistrates' courts are taken from Domestic Proceedings in Magistrates' Courts, 1989.[275] Later figures are collected on a different basis, and cannot provide a true comparison between magistrates' and the higher courts. Inevitably, however, 1989 statistics relate to proceedings decided before the implementation of the Children Act 1989 and still refer to custody and access orders which are no longer available. Recently published figures for 1992[276] show a reduction in the volume of private law applications for residence and contact orders under section 8 of the 1989 Act, but this does not necessarily affect the categorisation of such proceedings according to their volume (see para. 3 below). The 1992 figures for the other types of proceedings listed (insofar as they are available) do not differ substantially from those for 1989.

3. The table of statistics is used to categorise a type of proceedings as being broadly small, medium, or large volume. These categories are used to divide up the second and third tables on access and reporting respectively. Each category is separated by a thick horizontal line. Large volume cases are in the top third of

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[274] (1990), Cm. 1154. Figures for declarations of status and for child abduction proceedings were not given in the Annual Report.

[275] Published by the Home Office, 19 July 1990.

[276] Judicial Statistics, Annual Report 1992, (1993) Cm. 2268.

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these two tables, small volume at the foot, with medium volume in between. It should be noted that the tables on access and reporting have, out of necessity, been simplified, and should not be relied upon as a wholly accurate picture of the law. For a full account of the current law, see Part II.

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1. JUDICIAL STATISTICS

Type of proceeding		No. of orders (unless otherwise indicated)	Volume
Divorce	Defended cases	280 (cases disposed of after trial)	small
	Special procedure	151,204	large
Nullity		365	small
Judicial separation		1,678 (not clear how many of these came to trial)	small
Ancillary relief		101,695	large
Custody and access (nb higher cts only)		83,540 custody orders[277] 71,832 access orders	large
Wardship		4,008 orders confirming wardship	medium
Adoption		6,142 in the High Ct and county cts; 910 in mags cts	medium
Family provision		183 applications issued in Ch Div in London	small
Occupation of family home, domestic violence		21,673: High Ct & cty cts 5,050 applns in mags cts	medium
Consent to marriage		10 applns in mags cts	small
Maintenance applications in magistrates' courts		16,390	medium
Variation of orders in magistrates' courts		44,450	large
Enforcement proceedings	High ct + cty cts	376 committal orders 1806 attachment of earnings orders	small
	mags cts	84,590 proceedings decided	large
		3590 committal orders, of which only 480 immediate	medium

[277] 16,424 residence orders and 17,470 contact orders were made in private law proceedings during 1992 in all tiers of court.

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2. ACCESS TO FAMILY PROCEEDINGS

Key:

1. Sitting in open court
2. There exists a power to exclude the public during the taking of certain evidence
3. Access is restricted: the press may attend, but not the general public

Proceedings usually heard in private:

4. There exists a power to sit in private
5. Proceedings are heard in private, unless the court directs otherwise
6. Proceedings must be heard in camera

* This denotes the usual position, but the position may vary: see Part II for full details

Proceeding		1	2	3	4	5	6	
Undefended divorce and judicial separation					Judge decides these on the papers			LARGE
Ancillary relief						✓		
Children Act	High+cty cts					✓		
	mags cts		✓	✓	✓			
Enforcement & variation proceedings	High+cty cts	✓			✓*			
	mags cts			✓*				
Wardship						✓		MEDIUM
Adoption	High Ct				✓			
	cty+mags cts						✓	
Maintenance in mags cts				✓	✓*			
Domestic violence etc.	High+cty cts					✓		
	mags cts		✓	✓				
Defended divorce & jud sepn		✓						SMALL
Nullity		✓	✓					
Child abduction						✓		
Family provision					✓			
Declarations of status					✓			
Consent to marriage	High+cty cts					✓		
	mags cts		✓	✓				

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3. REPORTING OF FAMILY PROCEEDINGS

Note that unless indicated otherwise, no reporting restrictions apply, save that there is a discretion to ban the identification of children concerned in the proceedings in all cases.

Key:

1. The Administration of Justice Act 1960 applies, if the proceedings are held in private, thus prohibiting the publication of "information relating to proceedings".
2. Limited reporting restrictions apply, such as those in the 1926 Act or the 1980 Act, prohibiting the publication of details other than those specified.
3. An automatic ban on the identification of children concerned operates.

X? means restriction *probably does not* apply.

✓? means restriction *probably does* apply.

* This denotes the usual position, but the position may vary: see Part II for full details.

Proceeding		1	2	3	
Divorce, nullity, & judicial separation			✓		LARGE
Ancillary relief		X?	✓		LARGE
Children Act	High Ct & cty cts	✓			LARGE
	mags cts	✓	✓	✓	LARGE
Enforcement and variation proceedings	High Ct & cty cts	✓*			LARGE
	mags cts		✓*		LARGE
Wardship		✓			MEDIUM
Adoption	High Ct & cty cts	✓?			MEDIUM
	mags cts	✓?	✓	✓	MEDIUM
Maintenance applications in mags cts			✓	✓*	MEDIUM
Domestic violence etc.	High Ct & cty cts	X?			MEDIUM
	mags cts		✓	✓	MEDIUM
Child abduction		✓			SMALL
Family provision					SMALL
Declarations of status		X?	✓		SMALL
Consent to marriage	High Ct & cty cts	X?			SMALL
	mags cts	X?	✓		SMALL

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ANNEX C

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

1. Introduction

1.1 The European Convention for the Protection of Human Rights and Fundamental Freedoms[278] was signed in 1950 and ratified by the United Kingdom in 1951. The Convention contains a list of rights and freedoms which the contracting states are obliged to secure. The Convention also provides machinery for the enforcement of these rights and freedoms: there is the European Commission of Human Rights ("the Commission") and the European Court of Human Rights ("the Court"). Contracting states may bring cases against each other, and since 1966 it has been possible for individuals to bring applications against the United Kingdom to the Commission. If the Commission, after hearing the Government's observations, finds the application admissible, it considers the merits of the case under the Convention and produces a Report of its findings. The Commissions' findings are not legally binding. The case may then be referred to the Court by either the Commission or the Government. Judgments of the Court are binding. If it is not so referred, it remains with the Committee of Ministers.

1.2 The Convention contains a number of rights and freedoms which impinge on this review. The relevant Articles of the Convention are set out in full at the end of this Annex. They are, briefly:

(i) Article 6, which guarantees litigants a fair and public trial;
(ii) Article 8, which guarantees a person's right to respect for private and family life;
(iii) Article 10, which guarantees freedom of expression and the freedom to receive and impart information; and
(iv) Article 13, which guarantees the right to an effective remedy to those whose rights under the Convention are violated.

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[278] E.T.S. No.5, U.K.T.S. 70, (1950) Cmd. 8969. Referred to as "the Convention".

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1.3 Each Article is concerned with different aspects of the review. The discussion below relate to:

(a) the right of litigants to a public hearing;
(b) public access to proceedings;
(c) reporting of proceedings; and
(d) the right of those affected to challenge discretionary restrictions on access and reporting.

2. The right of litigants to a public hearing

2.1 This right is governed by Article 6. The Article provides for a "public hearing" and that "judgment shall be pronounced publicly". It then goes on to provide for exceptions to these requirements. The guarantees of Article 6 extend to all proceedings which involve a "determination of civil rights and obligations". It is assumed that Article 6 applies to all family proceedings under consideration in this review.[279]

2.2 The requirements for a public hearing and that judgment shall be pronounced publicly have come to the attention of the Commission and the Court on several occasions. From these cases, two points emerge. First, it seems that Article 6 may be complied with where a written procedure is used for a stage of the proceedings if the stage is concerned only with legal questions of a technical and abstract character and this stage can no longer detract from the fairness with which the main points have been examined in earlier stages of the proceedings.[280] In these earlier stages, however, where there has been an examination of the factual issues, as well as the legal issues, there must be both a public hearing and a publicly

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[279] All private law family proceedings will be covered: see the Rasmussen Case, judgment of 28 November 1984, A87, at para. 32. Since the public law proceedings impinge so much on private law concepts, it can be inferred that these also fall within Article 6(1): see O. v. U.K., judgment of 8 July 1987, A120, paras. 53-60.

[280] Report of 14 December 1981, X. v. Federal Republic of Germany, B57, paras. 81-86.

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pronounced judgment.[281]

2.3 Secondly, the requirement of a public judgment is complied with even where the court does not publicly pronounce the judgment, if the decision of the court is merely that the appeal has been rejected or that the case is to be referred back to a lower tribunal. In such cases, the parties must receive a copy of the text of the judgment as soon as possible, and the text must be freely available for inspection in a court office.[282]

2.4 The Court has therefore departed from a strict literal reading of Article 6(1), largely for pragmatic reasons. Article 6(1) goes on to provide that the press may be excluded from all or part of a trial in a number of circumstances. It has been queried whether this means that the requirement for public rendering of judgments is also subject to these exceptions. The question appears not to have been considered by the Commission or the Court. However, the books appear to suggest that, subject to the principles outlined above, the requirement that judgment be pronounced publicly is absolute and that the exceptions in the Article apply only to the requirement for a public hearing.[283]

2.5 Article 6(1) provides for six exceptions to the requirement that the hearing be public. These allow for the exclusion of the public:–

(i) in the interests of morals in a democratic society;
(ii) in the interests of public order[284] in a democratic society;
(iii) in the interests of national security in a democratic society;
(iv) where the interests of juveniles so require;

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[281] Report of 14 December 1981, Albert and Le Compte, B50, para. 78.

[282] Judgment of 8 December 1983, Pretto and Others, A71, paras. 22–28.

[283] Van Dijk and Van Hoof, Theory and Practice of the European Convention on Human Rights, (2nd ed., 1990), p. 327, and Fawcett, The Application of the European Convention on Human Rights, (2nd ed., 1987), p. 163.

[284] The meaning of "public order" in this context is not necessarily the same as "the prevention of disorder" found in, e.g., Article 10(2). See further Van Dijk and Van Hoof, *loc. cit.*.

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(v) where the protection of the private life of the parties so require; or
(vi) to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2.6 The exceptions, together with the general jurisprudence of the Court, grant a considerable discretion for national courts to exclude the public. The instances where family proceedings are currently held in private fall within the fourth or fifth grounds of restrictions above. Under the general jurisprudence of the Court, contracting states are allowed a certain discretion, or "margin of appreciation",[285] in securing the rights under the Convention. It is likely that the Court will allow contracting states a wide margin of appreciation in securing the rights under consideration, given the pragmatic interpretation of the requirement for a public judgment.[286] However, the Court is not willing simply to accept a developed practice, and requires the respondent state to indicate for each case which ground of restriction on which it is relying.[287] It would seem that the Court is hardly likely to "second guess" the legislatures and courts of contracting states as to whether care proceedings involving allegations of child sexual abuse are "required" to be heard in private.

2.7 It would seem clear, therefore, that a litigant in family proceedings has no greater right to insist on a public hearing under the law of the Convention than under English law.

3. Public access to proceedings

The nature of Article 6(1)

3.1 At first sight, it might appear that Article 6 governs the right of public

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[285] See below at paras. 3.11 to 3.12, and further, Van Dijk and Van Hoof, *op. cit.*, pp. 583-606.

[286] See also para. 4.4 below for the weight given to the assessment of the court hearing the case.

[287] Judgment of 8 June 1976, Engel and Others, A22, para. 89.

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access to court proceedings, as well as the right of litigants to a public trial. As outlined above, Article 6 has many exceptions specifying the circumstances in which the press and public may be excluded. However, it is submitted that Article 6 is concerned solely with the right of litigants to a public trial. This conclusion is based on three grounds. First, there is a structural argument based on the context of Article 6. Taken as a whole, Article 6 is concerned with the rights of due process of those in court, such as the presumption of innocence and the right to cross-examine witnesses, and not with the rights and freedoms of the media.

3.2 Second, there is the case law of the Convention. Article 6 guarantees litigants a right to a public trial. However, in the Case of Le Compte, Van Leuven and De Meyere, the Court stated:-

> "Admittedly, neither the letter nor the spirit of Article 6(1) would have prevented them from waiving this right of their own free will, whether expressly or tacitly ...; conducting disciplinary proceedings of this kind in private does not contravene the Convention, provided that the person concerned consents."[288]

Therefore, if the court and all parties agree on a closed trial, a journalist refused access cannot claim to be a victim of a violation of Article 6. There is, however, no right to a private trial under Article 6, only the possibility of waiving the right to a public trial.

3.3 Thirdly, there might be a stronger case for interpreting Article 6(1) as providing a right of public access to proceedings if this right could not be provided for under any other Article. However, it appears that a right of public access may be derived from Article 10, and we consider this in the following paragraphs.

3.4 Article 10 guarantees the right to freedom of expression. This includes freedom to "receive and impart information and ideas without interference by public authority", though subject to the limitations in paragraph (2). There would seem to be

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[288] Judgment of 23 June 1981, A43, para. 59. See also judgment of 30 November 1987, H. v. Belgium, para. 54.

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no case law under the Convention on the question whether, and if so to what extent, the freedom to receive information entails an obligation on the part of the national authorities to impart information. There is a textual argument to the effect that the freedom to receive information "without interference by public authority" suggests an authority which is refraining from interfering with the flow of information rather than one which is obliged to provide information.[289]

3.5 There is little relevant case law under the Convention dealing with the freedom to receive information. However, the similar freedoms guaranteed by the First Amendment to the Constitution of the United States have been subject to much judicial interpretation. The U.S. case law may therefore provide some assistance as a guide to the possible interpretation by the Court of Article 10. Indeed, in a recent case on freedom of expression before the Court, several members of the Court referred to relevant decisions of the U.S. Supreme Court.[290]

3.6 The Supreme Court has held that there is no First Amendment right to receive general governmental information, such as might be provided under a Freedom of Information Act.[291] In Gannett Co. v. DePasquale[292] the Supreme Court held by a majority that the right under the Sixth Amendment to a public criminal trial could be invoked only by the criminal defendant, and not by the media, whilst reserving the question of whether the First Amendment contained a right of public access to trials. This adds weight to the view expressed above[293] that Article 6(1) of the Convention is concerned only with the rights of litigants. In Richmond

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[289] This is argued by Alkema, referred to in Van Dijk and Van Hoof, *op. cit.*, p. 418.

[290] See the judgment of 26 November 1991, The Observer and The Guardian v. U.K., A216, where both Judge De Meyer, whose opinion was joined by others, and Judge Morenilla referred to the Pentagon Papers case (New York Times v. U.S. (1971) 403 U.S. 713) in their partially dissenting opinions.

[291] See, e.g., Pell v. Procunier (1974) 417 U.S. 817; Houchins v. KQED (1978) 438 U.S. 1.

[292] (1979) 443 U.S. 368.

[293] At para. 3.1.

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Newspapers v. Virginia[294] the Supreme Court held that the First Amendment did contain such a right of public access to criminal trials.

3.7 In addition, the Supreme Court has extended the right of public access to voir dire proceedings and preliminary hearings, but refused to grant public access to discovery hearings. Further, it seems that the opinions delivered in Richmond Newspapers[295] suggest that the Court would also have extended the right of public access to civil trials, had the point been in issue.[296]

3.8 This suggests therefore that the Court may interpret Article 10 as containing a right of public access to proceedings. If this is so, then this right will be subject to the restrictions in Article 10(2). Interferences with the rights and freedoms under Article 10 may be lawfully imposed where they are "prescribed by law and are necessary in a democratic society" for one or more of the aims set out in Article 10(2). Restrictions on public access to family proceedings fall within one (at least) of the aims set out, namely "for the protection of the reputation or rights of others".

3.9 The Court has held that, for an interference to be "prescribed by law", the following must be satisfied:-

(i) the interference must have a legal basis in domestic law;
(ii) the law in question must be accessible; and
(iii) the law must be foreseeable.[297]

The restrictions on public access to family proceedings under English law certainly satisfy (i) and (ii) above.

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[294] (1980) 448 U.S. 555.

[295] *Ibid.*

[296] See further, L.H. Tribe, American Constitutional Law, (2nd ed., 1988), pp. 955-970.

[297] Judgment of 25 March 1983, Silver and Others, A61, paras. 86-88.

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3.10 The third limb, the foreseeability test, requires further comment. In general, it requires that the law be sufficiently certain so that the citizen can foresee, to a degree that is reasonable in the circumstances, the consequences which a given act may entail.[298] However, the mere fact that a legislative provision may give rise to problems of interpretation does not mean that the law is not foreseeable. Further, in the Malone Case, concerning telephone tapping, the Court held that the law itself must indicate "the scope and manner of exercise of the relevant discretion conferred upon the public authorities".[299] One reason given for this dictum was that, in cases involving secret measures such as the Court was considering, the scope and manner of exercise of the discretion cannot be ascertained in any other way. It is therefore unclear whether this dictum applies only where the alleged violation of the Convention relates to a secret measure. In certain family proceedings the court has a discretion to sit in private or in public.[300] If the dictum in Malone is not confined to cases involving "secret measures", it may be that some elaboration is needed as to how this discretion is to be exercised.

3.11 Finally, for interferences with Article 10 rights and freedoms to be lawful under the Convention, they must be "necessary in a democratic society". This means that the interference must "correspond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued'"; further, "those paragraphs of Articles of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted".[301] On the one hand, it is not the function of the Court to substitute its view as to the necessity of an interference for that of the contracting states. On the other hand, the Convention itself would be utterly futile if the contracting states had the ultimate responsibility for a decision as to whether an interference was necessary.

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[298] *Ibid.*.

[299] Judgment of 2 August 1984, A82, para. 79, and paras. 67-68.

[300] See Part II for full details.

[301] Judgment of 25 March 1983, Silver and Others, A61, para. 97.

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3.12 The Court attempts to strike a balance between the two extremes through the doctrine of the "margin of appreciation".[302] In some cases, the Court grants a wide margin of appreciation, merely requiring the respondent state to have made a reasonable decision in its assessment of necessity.[303] In others, the Court undertakes a more intense review of the decision of the respondent state, coming close to reaching its own decision as to the necessity of the impugned measure.[304] The width of the margin of appreciation in relation to any given area of law will vary according to a number of factors.[305]

3.13 It is impossible to predict with any certainty the attitude of the Court to restrictions on public access to proceedings. However, for reasons similar to those described above in relation to the right to a public trial, it is considered that the margin of appreciation afforded by the Court will be a wide one, and that restrictions on access to family proceedings will be considered "necessary in a democratic society" for the protection of the parties' right to respect for their private and family lives.

3.14 In conclusion, it is highly possible that Article 10 guarantees a right of public access to proceedings. However, if the right is held to exist, it would be subject to the restrictions in Article 10(2). From the above analysis, it is probable that the restrictions on access to family proceedings are lawful under the Convention.

4. Reporting of proceedings

4.1 Two Articles of the Convention are relevant to the reporting of proceedings. Of first importance is Article 10, guaranteeing freedom of expression,

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[302] See further, Van Dijk and Van Hoof, *op. cit.*, pp. 583-606.

[303] See, for instance, Lithgow and Others, judgment of 8 July 1986, A102, where the Court found no violation as the judgment of the legislature was not "manifestly without reasonable foundation"; see para. 122.

[304] See, e.g., The Sunday Times Case, judgment of 26 April 1979, A30, paras. 59-68.

[305] See Van Dijk and Van Hoof, *loc. cit.*.

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including the freedom of the press. The right to respect for private and family life under Article 8 is also highly significant in the context of reporting family proceedings.

4.2 There would appear to be one reported case under the Convention dealing with the question of reporting restrictions, that of Hodgson and Others v. U.K.,[306] before the European Commission of Human Rights. The case concerned the trial of Clive Ponting under the Official Secrets Act. Channel Four had planned an extended "Court Report" of the proceedings on the evening of each night of the trial. The trial judge, McCowan J., made an order under section 4(2) of the Contempt of Court Act 1981 postponing reports of the trial in the form Channel Four had intended. In accordance with the accepted case law, McCowan J. held that Channel Four was not allowed to be heard to oppose the order.

4.3 The applicants contended that the order restricting reporting was a contravention of Article 10 and that their inability to challenge the order in an English court was a breach of Article 13, there being no 'effective remedy'. Article 13 is discussed below in chapter 5. In relation to Article 10, the Commission found the complaint under this Article to be inadmissible. It held that the order containing the reporting restrictions was an interference with freedom of expression, and went on to consider whether it properly came within an exception in Article 10(2). The Commission held that the interference corresponded to a legitimate aim, namely to protect the fair trial of the accused, and was prescribed by law.

4.4 The Commission held further that the interference could reasonably be considered necessary in a democratic society for the legitimate aim. This was because the Commission was of the opinion that the interference was proportionate and corresponded to a pressing social need, attaching great weight to the right to a fair trial. In finding the restrictions to be justified, the Commission was very deferential

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[306] Decision of 9 March 1987, Hodgson, Woolf Productions, N.U.J. and Channel Four T.V. v. U.K. (1987) 51 D & R 136; (1987) 10 E.H.R.R. 503. The case of Crook and N.U.J. v. U.K., concerning an order made under s. 11 of the Contempt of Court Act 1981, was settled before the Commission considered the admissibility of the application: see decision of 15 July 1988, (1988) 56 D & R 148.

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to the assessment of the trial judge:

> " ... where a trial judge is confronted, in the opening of a highly publicized and controversial trial, with a potentially prejudicious media report, great weight must be attached to his on-the-spot assessment of the dangers of prejudicing the jury and thereby harming the fairness of the trial. Such a calculation, involving as it does the proper balance to be struck between the applicants' freedom of expression and the fair administration of justice, is a matter which falls within the Contracting States' margin of appreciation subject, of course, to supervision by the organs of the Convention.
>
> ... the appropriate response is one which, in principle, must lie with the trial judge."[307]

4.5 The Hodgson application was concerned with postponement orders in criminal trials. Not all of the Commission's observations are appropriate in relation to family proceedings and the types of restrictions operative in such proceedings. It must be noted that the decision was only one of the Commission, and not the Court, and one only as to admissibility. The case may to some extent therefore turn on its particular facts, for three reasons:-

(i) the interference was not with content but with 'style';
(ii) the interference on style was only of a postponing nature; and
(iii) Channel Four were able to make contemporaneous reports of all the factual and legal issues involved in the case.

4.6 The interference with freedom of expression where there is a total and possibly perpetual ban on publication of information relating to proceedings, for instance in wardship, is of a far different nature and degree. The same is true of the various statutes which restrict reporting of certain family proceedings to a concise statement of the facts, submissions on points of law, and the decision of the court.[308]

4.7 It is clear that the various restrictions on the reporting of family

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[307] *Ibid.*, (1987) 51 D & R 136, 146; (1987) 10 E.H.R.R. 503, 509.

[308] See Part II above for further details of reporting restrictions.

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proceedings correspond to a legitimate aim, namely that of protecting the parties' right to respect for their private and family lives. The restrictions must also be "prescribed by law": it seems clear that they have a legal basis in domestic law and are accessible. Despite some uncertainty as to whether some restrictions apply in certain cases, it is probable that the law is also foreseeable,[309] and so the restrictions are "prescribed by law".

4.8 The question whether the restrictions are in accordance with the Convention depends therefore on whether they are "necessary in a democratic society". Again, it is not clear how wide a margin of appreciation the Court will afford in considering the restrictions. With respect to the restrictions which simply prevent reporting of the factual details of the case, it may be said that these provide some protection for the private lives of the parties whilst allowing discussion of the legal issues. The restriction on what might be considered "political speech", relating to ideas and issues of principle, is therefore minimal. For this reason, it is considered that the Court will find this type of restriction to be in accordance with the Convention.

4.9 In relation to the prohibition on the publication of information relating to proceedings, this might at first sight appear more problematic. It might be argued that it cannot be proportionate to the aim of protecting privacy to provide for a ban on publication of all information relating to the case. However, this prohibition applies only in children cases, and where the proceedings have been held in private. Thus the interference with freedom of expression serves both the protection of the child's right to respect for his private and family life, and for preventing the disclosure of information received in confidence, within Article 10(2). It is therefore considered that this type of restriction will also be lawful under the Convention, for two reasons.

4.10 First, it is unlikely that the Court will attempt to "second guess" the authorities in contracting states as to whether cases involving children, which have been heard in private on a confidential basis, require this confidentiality to be protected

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[309] See para. 3.10 above.

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in this way. Secondly, while a detailed survey has not been undertaken, it is probable that many other contracting states have some kind of reporting restrictions in cases involving children. Where a number of contracting states have provided for a particular interference with freedom of expression, it is unlikely that the Court will hold that the interference is not necessary in a democratic society.

4.11 It is therefore considered that the current law on reporting of family proceedings is in accordance with Article 10 of the Convention, as would any new reporting regime that might be implemented as a result of this review.

4.12 Article 8, which guarantees a person's right to respect for his private and family life, also calls for consideration. Under the law of most jurisdictions in the United States, unlike under English law, there is a general "right to privacy", which often includes a specific tort of public disclosure of private facts. This acts as a limit on the ability of the press lawfully to publish details of a person's private life. Clearly, information a person divulges in the course of family proceedings will usually relate to his private life. It is possible that Article 8 requires contracting states to set limits as to what may be published about a person's private life. However, the Convention requires contracting states not to interfere with Convention rights and freedoms except in specified circumstances. The extent to which the Convention requires contracting states to provide for protection from interferences by other individuals is very uncertain and has not yet, it appears, been recognised by the Court.[310]

4.13 Even if Article 8 were to require restrictions on the ability to publish "private facts", information about judicial proceedings may not come within "private facts" for this purpose, since such information may well be a matter of public record. Indeed, the U.S. Supreme Court in Cox Broadcasting v. Cohn[311] held that the First Amendment meant that the media could not be prevented from publishing the name of a rape victim, where the name was a matter of public record.

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[310] See further Van Dijk and Van Hoof, *op. cit.*, pp. 15–20.

[311] (1975) 420 U.S. 469.

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4.14 It is therefore considered that Article 8 does not require contracting states to restrict reporting to protect the private lives of the parties. In conclusion, reporting of family proceedings is therefore probably in accordance with the Convention.

5. Challenging restrictions on access and reporting

5.1 Article 13 is concerned to guarantee an effective remedy for those whose human rights set out in the Convention have been violated. Three points may be made on the interpretation of Article 13. First, "where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided, and, if appropriate, to obtain redress".[312]

5.2 Secondly, "Article 13 does not guarantee a remedy allowing a contracting state's laws as such to be challenged before a national authority on the ground of being contrary to the Convention".[313] Thirdly, it is necessary to consider what an effective remedy entails:-

> "the authority referred to in Article 13 may not necessarily in all circumstances be a judicial authority in the strict sense ... Nevertheless, the powers and procedural guarantees an authority possesses are relevant in determining whether the remedy before it is effective".[314]

From this it may be said that judicial review is capable of being an effective remedy within Article 13, but whether or not it is so effective will depend on the circumstances and the subject-matter of the case.

5.3 In this context, the recent case involving the deportation of Tamil asylum

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[312] Judgment of 25 March 1983, Silver and Others, A61, para. 113.

[313] Judgment of 26 March 1987, Leander, A116, para. 77.

[314] Judgment of 6 September 1978, Klass and Others, A28, para. 67.

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seekers is of some relevance. Here, a majority of the Court held that the judicial review proceedings in which the deportation orders were challenged did constitute an effective remedy within Article 13.[315] In support of this, the majority referred to judicial review case law which stressed that the courts should be especially vigilant in asylum cases, and also to instances where the courts had quashed deportation decisions.[316] Judge Walsh gave a partially dissenting opinion, which was joined by Judge Russo. In this, he pointed out the difficulty of resolving disputed factual questions in judicial review questions, and the very limited occasions where the court may quash a decision which the court disagrees with on the merits. He therefore held that judicial review had not been an effective remedy for the applicants before the Court, and continued:-

> "It appears to me that a national system which it is claimed provides an effective remedy for a breach of the Convention and which excludes the competence to make a decision on the merits cannot meet the requirements of Article 13."[317]

5.4 The above serves as an illustration as to the difficulty of determining whether judicial review is an effective remedy in any given case. This is of some importance, since currently the only method of challenging decisions as to access and reporting made by magistrates' courts and county courts in family proceedings is by way of judicial review.[318] However, this is not possible in respect of such decisions made by the High Court or any appellate courts,[319] nor are there any rights of appeal.

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[315] Judgment of 30 October 1991, Vilvarajah and Others v. U.K., A215, paras. 126-127.

[316] *Ibid.*, at paras. 91-92.

[317] *Ibid.*, at para. 3 of the separate opinion.

[318] See, for instance, R. v. Felixstowe Justices, ex parte Leigh [1987] Q.B. 582. Similarly, a county court is an inferior court and its decisions are therefore capable of judicial review.

[319] These are superior courts and therefore not subject to judicial review -- see In re Racal Communications Ltd. [1981] A.C. 374, 384 *per* Lord Diplock.

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5.5 It is therefore arguable that Article 13 requires there to be some kind of procedure whereby a restriction on access and reporting in a particular case may be challenged to determine whether it is compatible with the Convention. This view is supported by the decision of the Commission in the Hodgson[320] case that the complaint under Article 13 was admissible. The application was later settled,[321] and section 159 of the Criminal Justice Act 1988 was introduced to provide a method of challenging restrictions made by the Crown Court.

[320] Decision of 9 March 1987, (1987) 51 D & R 136; (1987) 10 E.H.R.R. 503.

[321] Report of 15 July 1988, (1988) 56 D & R 156.

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Relevant Articles of the Convention

6(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
...

8(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

10(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of this right, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

13 Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

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